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SINGLE APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 835

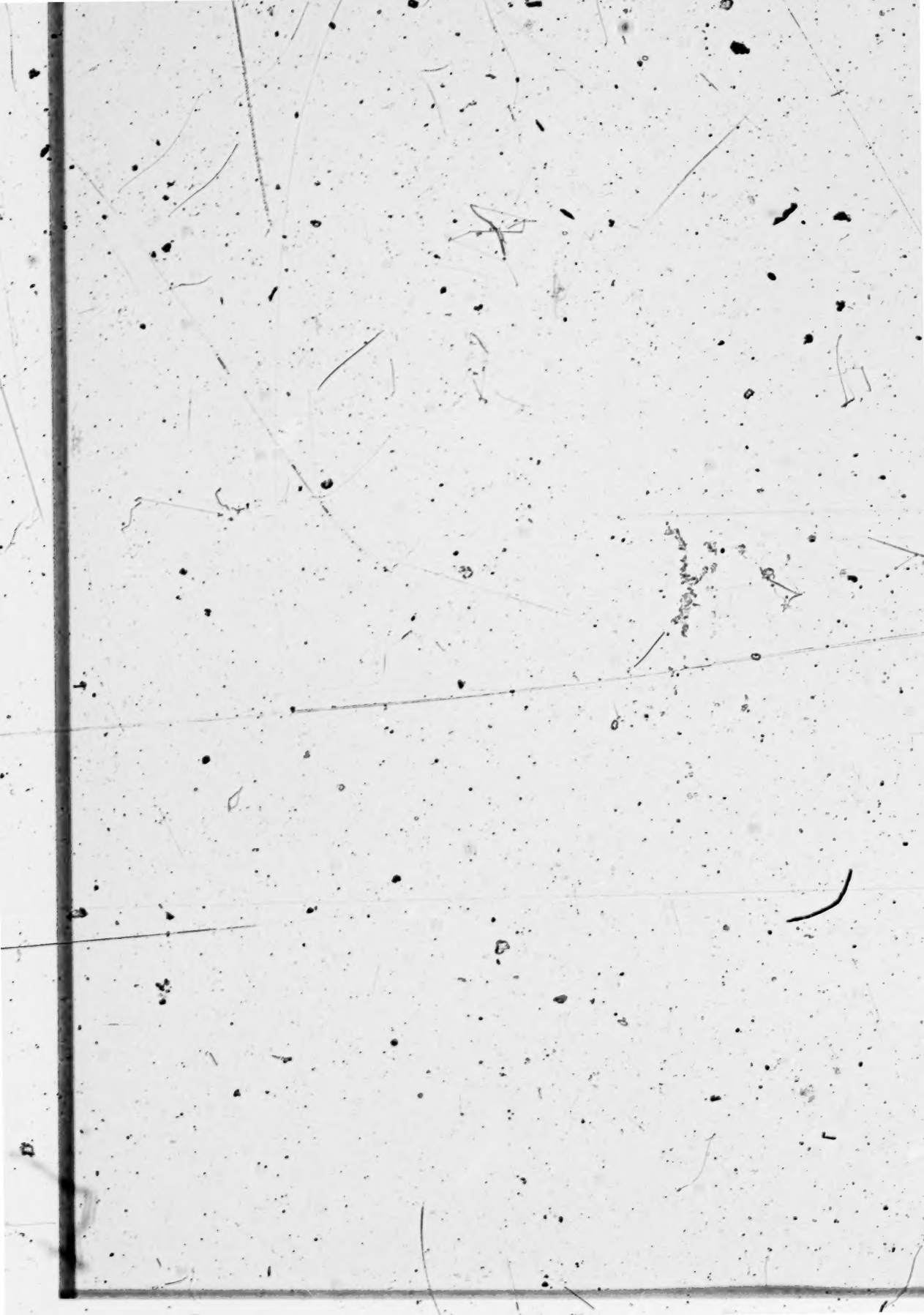
ROBERT KENNETH DEWEY,
Petitioner,

vs.

REYNOLDS METALS COMPANY,

On Writ of Certiorari to the United States
Court of Appeals for the Sixth Circuit

PETITION FOR CERTIORARI
FILED OCTOBER 12, 1970
CERTIORARI GRANTED JANUARY 18, 1971



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APPENDIX
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT KENNETH DEWEY,
Plaintiff,

vs.

REYNOLDS METALS COMPANY,
Defendant.

File No. 5889

RELEVANT DOCKET ENTRIES

1968

May 31 Complaint filed.
June 19 Answer of Reynolds Metals Company, filed.
June 27 Plaintiff's Interrogatories to Defendant, filed.
Aug. 7 Stipulation for Amendment of Complaint and Amended Complaint, filed.
Aug. 14 Answers to Plaintiff's Interrogatories, filed.
Aug. 16 Order Allowing Plaintiff to Amend Its Complaint in accordance with Stipulation previously filed, filed.
Aug. 29 Defendant's Notice of Motion for Dismissal for Failure to State a Claim Upon Which Relief Can be Granted; Points and Authorities in Support of Motion; and Affidavit of Robert Lies, filed.
Sept. 23 Plaintiff's Brief in Opposition to Defendant's Brief and Motion to Dismiss for Failure to State a Cause of Action Upon Which Relief can be Granted. Attorney's Affidavit, filed.
Oct. 9 Defendant's Brief as to the Application of Constitutional Guarantee of Freedom of Religion under First Amendment, etc., filed.

Oct. 18 Order Denying Defendant's Motion to Dismiss, filed.

Nov. 5 Opinion Denying Defendant's Motion to Dismiss, filed.

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Mar. 17 Stipulation of Facts and Exhibits attached, filed.

Mar. 27 Brief for Defendant Reynolds Metals Company, filed.

Mar. 28 Plaintiff's Trial Brief, filed.

Apr. 4 Brief of National Jewish Commission on Law and Public Affairs, Amicus Curiae, filed.

Apr. 7 Hearing--Arguments by Counsel before the Court. Matter taken under advisement.

Apr. 24 Supplementary Brief for Defendant Reynolds Metals Company in Response to Amicus Curiae Brief of National Jewish Commission on Law and Public Affairs, filed.

June 6 Opinion of the Court, awarding Plaintiff reemployment and back pay from August 1, 1967, filed. Court to retain jurisdiction of case.

July 8 Notice of Motion and Motion for Entry of Judgment, filed.

July 14 Defendant's Notice of Motion for Supersedeas Bond; Points and Authorities in Support of Motion; Affidavits of Robert E. Jordan, Charles C. Hudgins, and Henry J. Wilcoxsin in Support of Motion, filed.

July 16 Affidavit of Robert Kenneth Dewey in Opposition to Defendant's Motion to Stay, filed.

July 16 Hearing on Defendant's Motion for Stay of Judgment Pending Appeal.

July 16 Opinion from the bench. Money aspect of Opinion will be stayed.

July 16 Reinstatement of Plaintiff as an employee will not be stayed.

July 16 The Court will withhold ruling on attorney's fees pending appeal.

July 25 Opinion on Motions for Entry of Judgment and Stay of Judgment, filed.

July 25 Judgment Granting Permanent Injunction, and Reinstatement, Credit for Seniority and Fringe Benefits, and Back Pay, filed.

July 25 Order Staying Execution in Part (specifically Paragraph 4 of Judgment) pending final disposition of this cause in appeal, filed.

July 31 Notice of Appeal by Defendant Reynolds Metals Company, filed.

July 31, Supersedeas Bond in amount of $15,000.00, filed.

Aug. 1 Transcript of proceedings held July 16, 1969, filed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

1969

Aug. 4 1 envl. exhibits Certified record and exhibits returned to District Court 9/4/70

Aug. 4 Motion of Appellant for supersedeas, memorandum in support, with affidavits and exhibits A through E, filed; and cause docketed

Aug. 4 Affidavit of service by mail on the above motion

Aug. 4 Appearance of counsel for Appellant

Aug. 7 Appearance of counsel for Appellee

Aug. 8 Brief of Appellee in opposition to motion of Appellant for supersedeas bond and stay of judgment

Aug. 12 Proof of service on 8/7/69 of brief in opposition to motion for supersedeas bond and stay of judgment

Aug. 19	Order denying motion of Appellant to stay enforcement of the District Court judgment without prejudice to its renewal in the event overtime productions schedules which might invoke paragraph 2 of the judgment should be resumed (McCree, J.) R-187
Sep. 3	Certified record (1 vol. pleadings), filed; and cause docketed as of August 4, 1969
Sep. 10	Motion: Appendix and Appellant's brief to 10/13/69 (Granted, but no further extensions will be considered - JWP)
Oct. 9	Twenty-five copies of Brief for Appellant
Oct. 9	Ten copies of Appendix for Appellant
Oct. 9	Proof of service of brief and appendix for Appellant
Oct. 29	Motion of Equal Employment Opportunity Commission for leave to file a brief amicus curiae and present oral argument
Oct. 29	Motion for extension of time to 11/26/69 to file brief as amicus curiae
Nov. 3	Response to motions of Equal Employment Opportunity Commission to file brief Amicus Curiae, present oral argument and extend time for filing brief, with Appellant's proof of service
Nov. 6	Proof of service of brief for Appellee
Nov. 7	Twenty-five copies of Brief for Appellee
Nov. 10	Motion for extension of time to 11/26/69 to file brief Amicus Curiae, and Motion of National Jewish Commission on Law and Public Affairs for leave to file brief Amicus Curiae, with proof of service
Nov. 12	Order allowing Equal Employment Opportunity Commission to file brief amicus curiae by 11/26/69 and to present oral argument only to extent that Appellant may yield any time alloted him under the rules (McCree, J.) R-327

Nov. 13 Response of Appellant to motions of National Jewish Commission on Law to file brief amicus curiae, etc.

Nov. 26 Twenty-five copies of Brief of National Jewish Commission on Law and Public Affairs, Amicus Curiae

Nov. 26 Proof of service of brief of National Jewish Commission, amicus curiae

Dec. 1 Twenty-five copies of Brief for Equal Employment Opportunity Comm. as amicus curiae, with proof of service

Dec. 8 Request of Appellant for permission to file answer to Amici briefs, also in typewritten form (Granted. Reply brief by 12/24/69- JWP)

Dec. 19 Ten copies Brief of Appellant in reply to briefs of National Jewish Commission and Equal Employment Opportunity Commission

Dec. 19 Proof of service of Appellant's brief in reply to amici briefs

1970

Feb. 9 Cause argued and submitted (Before: Weick, Combs and O'Sullivan, JJ.) R-485

Feb. 16 Four copies of Supplemental Brief for Appellee

Feb. 17 Four copies of Supplementary Brief for Appellant

Feb. 19 Twenty-five copies of Supplemental Brief of Equal Employment Opportunity Commission as Amicus Curiae

Mar. 19 Four copies of Opinion of District Court at Cleveland, Ohio in Mrs. Sarah H. Beamer, et al. v. Alsco, Inc. (Copies distributed to the Court for counsel for Equal Employment Opportunity Comm.)

June 4 Judgment of the District Court reversed and case remanded with instructions to dismiss the complaint R-716

June 4 Opinion by Weick, J. (Combs, J., dissenting)

June 17 Twenty-five copies of Petition for Rehearing and Suggestion for Rehearing in Banc, with proof of service

June 26 Twenty-five copies of Supplement to Petition for Rehearing with copy of Opinion of Fifth Circuit in Hutchings v. United States Industries, Inc., and proof of service

June 29 Nine copies of Motion of National Jewish Commission on Law and Public Affairs, as Amicus Curiae, for leave to file memorandum in support of Appellee's suggestion for rehearing in banc, with copies of Memorandum attached (Distributed to the Court in banc)

July 1 Motion of Equal Employment Opportunity Commission for leave to file a brief in support of petition for rehearing and suggestions for rehearing en banc, as amicus curiae (Granted)

July 2 Twenty-five copies of Brief in support of Petition for Rehearing and Suggestion for Rehearing in Banc as Amicus Curiae tendered (Filed)

July 14 Motion of NAACP Legal Defense and Educational Fund, Inc. for leave to file a brief Amicus Curiae in support of petition for rehearing, with proof of service (Granted - PCW)

July 14 Twenty-five copies of Brief of NAACP Legal Defense and Educational Fund, Inc., as Amicus Curiae, in support of Appellee's petition for rehearing tendered (Filed July 27, 1970 and distributed)

July 30 Order referring petition for rehearing to panel for final disposition (Weick, J.) S-61

Aug. 11 Order denying petition for rehearing (Weick, McCree and O'Sullivan, JJ.) S-79

Aug. 11 Opinion on petition for rehearing (Weick, J., - McCree, J., dissenting)

Sep. 4 Mandate issued (Costs to be recovered by Appellant - $25.00 filing fee)
Opinion with mandate and opinion on petition for rehearing

Sep. 25 Letter from counsel for Appellee requesting preparation of record for the Supreme Court of the United States

Sep. 29 Certified record for certiorari application mailed to Clerk of United States Supreme Court

Oct. 19 Notice of filing petition for certiorari 10/12/70 (Sup. Ct. No. 835)

COMPLAINT
(Filed May 31, 1968)

The Plaintiff says:

1. This action arises under Public law 88-352, Title VII, Section 706 (e), July 2nd, 1964, 78 Stat. 259, 42 USC 2000e, et seq, and 28 USC 1343, as hereinafter more fully appears. The jurisdiction of this Court in invoked to secure protection and redress deprivation of rights secured by Title VII of the Act known as "Civil Rights Act of 1964," 42 USC 2000e, providing for relief against religious discrimination in employment.

2. The defendant is a corporation with its executive offices in Richmond, Virginia, and an "aluminum extrusion" plant in Grand Rapids at Beverly and Porter Streets, S. W., Kent County, Michigan.

3. The unlawful acts complained of herein occurred at the Grand Rapids plant site.

4. Plaintiff resides at 901 32nd St., S.W., in the City of Wyoming, Kent County, Michigan. That plaintiff is an adult.

5. The plaintiff was employed by the defendant from July 14, 1951, through September 12, 1966. During this period, plaintiff held a number of different jobs but, at the time of his termination, he was employed in the capacity of a die repairman.

6. Since 1962, the plaintiff has been a member of the Reformed Church and, consistent with the religious beliefs of the plaintiff as a member of said church, plaintiff has refused to work on Sundays. However, plaintiff consistently volunteered for

overtime and extra work to accommodate employer on every day but Sunday.

7. In 1960, a new Labor-Management Agreement was executed between the UAW-AFL-CIO and Reynolds Metals Company, and the 1960 Labor-Management Agreement provided that the Company could schedule compulsory overtime work, including Sundays. This provision was carried forward in the 1965 Labor-Management Agreement which was in effect at the time of the termination which is the basis of this action. Overtime scheduling for Sunday only became necessary in late 1965-1966.

8. From 1960 until 1965, the compulsory overtime provision was not exercised, and the Company functioned on a 5-day work week schedule. However, the defendant began scheduling Sunday overtime during late 1965.

9. In a bulletin dated September 20, 1965, the Management agreed to allow employees to be relieved of Sunday work if they obtained a qualified replacement.

10. Plaintiff refused to work scheduled Sunday overtime because it was against his religious beliefs. Plaintiff was scheduled to work Sunday, August 28, 1966; September 4, 1966; and September 11, 1966. He did not report for work on any one of these three Sundays, having previously made it expressly known to the defendant company that it was against his religious beliefs to work on Sundays and that he would not report for work on Sundays. Plaintiff further made it known that he would not seek a substitute to work in his place because it was his belief that if it was not right for him to work on Sundays, it would not be right to request someone to work in

his place on Sundays, regardless of the substitute's religious beliefs; but rather, that the Company should obtain the substitute so as to accomodate his religious beliefs. The September 11th absence resulted in a third written offense, and plaintiff was terminated pursuant to company rule 11.

11. At the time plaintiff was discharged, there were approximately 341 employees at the Grand Rapids Plant. Of this number, approximately 13 men were qualified to do the work of a die repairman. Further, an available substitute, an employee by the name of Zagman, was available and willing, as were other employees, to substitute for employees who did not wish to work on Sundays, but the Company refused to accept these substitutes unless the substitute was requested to work by the employee who was scheduled for Sunday overtime.

12. The defendant Company did obtain a substitute for an employee assigned for Sunday work who expressed the desire to attend a family reunion, but defendant would not obtain a substitute for an employee whose religious beliefs do not approve of working on Sunday.

13. The defendant's position with reference to requiring the employee to seek a substitute is inconsistent with the Equal Employment Opportunity Commission's guidelines, Title 29--Labor, Chapter XIV, Part 1605, Section 1605.1 (b), Federal Register, Volume 32, No. 134--Thursday, July 13, 1967, which states in part:

> "The Commission believes that the duty not to discriminate on religious grounds, required by Section 703 (a) (1) of the Civil Rights Act of 1964, includes an obligation on the part

of the employer to make reasonable accommodations to the religious needs of an employee and prospective employee where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer."

14. On January 4th, 1967, plaintiff filed a request with the Equal Employment Opportunity Commission, Regional Office, in Cleveland, Ohio, to assume jurisdiction and to investigate his charge against Reynolds Metals Company.

15. Following an extensive investigation by the Equal Employment Opportunity Commission, the Commission found Reasonable Cause to exist to believe that the Reynolds Metals Company was in violation of Section 703 (a) (1) of Title VII of the Civil Rights Act of 1964, as Alleged, a copy of which decision is hereunto attached as Exhibit A and made a part hereof.

16. The Equal Employment Opportunity Commission then attempted to eliminate the unlawful practice it found by conciliation as provided for in Title VII. However, the final disposition of this matter was unsatisfactory, and on May 3rd, 1968, the Commission directed a "30-Day Letter" to plaintiff advising him that conciliation efforts had failed to achieve voluntary compliance, and that the only remedy remaining to plaintiff was to institute a civil action in the United States District Court, pursuant to the provisions of Section 706 (e) of Title VII of the Civil Rights Act of 1964; 42 USC 2000e-5 (e), a

copy of which letter is hereunto attached as Exhibit B and made a part hereof.

WHEREFORE, plaintiff demands judgment against defendant, Reynolds Metals Company:

1. That defendant be ordered to reinstate plaintiff to the position which he held at the date of his termination on September 12th, 1966, with all back pay and other attendant fringe benefits accruing to an employee in the capacity in which plaintiff was employed at the time of termination, in accordance with the terms of the Labor-Management Agreement, including reinstatement of full seniority.

2. For such other or further relief as may be equitable in the premises.

VANDER VEEN, FREIHOFER & COOK
By: Donald F. Oosterhouse
Attorneys for Plaintiff
Business address:
950 Union Bank Building
Grand Rapids, Michigan 49502

Dated: May 31, 1968.

STIPULATION FOR AMENDMENT OF COMPLAINT
(Filed August 7, 1968)

It is hereby stipulated by and between the parties hereto that Plaintiff may file the Amended Complaint attached hereto, and service of a copy thereof is hereby accepted.

Dated: August 5, 1968.

VANDER VEEN, FREIHOFER & COOK
By: Peter R. Tolley
Attorneys for Plaintiff
Business Address:
950 Union Bank Building
Grand Rapids, Michigan 49502
CROSS, WROCK, MILLER & VIESON
Attorneys for Defendant
4200 Penobscot Building
Detroit, Michigan 48226
William Coughlin

ORDER ALLOWING AMENDMENT
(Filed August 16, 1968)

Upon reading and considering the Amendment stipulated by and between the Attorneys for the respective parties herein, upon motion of Plaintiff.

THEREFORE IT IS HEREBY ORDERED that Plaintiff may amend its Complaint herein in the form annexed to said Stipulation.

Dated: August 16, 1968.

NOEL P. FOX
United States District Judge

AMENDED COMPLAINT
(Filed August 7, 1968)

NOW COMES the Plaintiff, Robert Kenneth Dewey, by his attorneys Vander Veen, Freihofer & Cook, leave of court being first had and obtained pursuant to Stipulation of Counsel, and amends his complaint in the following particulars, to wit: by adding, as Paragraph No. 2 of Plaintiff's prayer and demand for Judgment the following:

2. That Defendant be ordered and directed to pay to Plaintiff reasonable attorney's fees as part of Plaintiff's costs in this cause pursuant to Title 42 USC 2000e-5 (K) And also by deleting the Number 2 and inserting Number 3 for the following to be the third paragraph of Plaintiff's prayer:

3. For such other or further relief as may be equitable in the premises.

This amended complaint is not intended to supersede the original complaint, and the original complaint remains in full force and effect except as above amended.

VANDER VEEN, FREIHOFER & COOK
By: Peter R. Tolley
Attorneys for Plaintiff
Business Address:
950 Union Bank Building
Grand Rapids, Michigan 49502

Dated: August 5, 1968.

ANSWER
(Filed June 19, 1968)

Defendant, REYNOLDS METALS COMPANY, by its attorneys, in answer to the Complaint heretofore filed in this matter, says:

1. Answering paragraph 1 of said Complaint, Defendant admits the allegations contained therein, except that it denies the applicability of said public law to Plaintiff's alleged claim.

2. Answering paragraph 2 of said Complaint, Defendant admits that it is a corporation with its

executive offices in Richmond, Virginia, but denies each and every allegation thereafter because of inaccuracies as to the description of the function of the plant and its geographical location. Further answering paragraph 2, Defendant alleges that it operates a plant engaged in the production of aluminum extrusions and aluminum billets at Beverly and Porter Streets, S.W. located in the City of Wyoming, Kent County, Michigan.

3. Answering paragraph 3 of said Complaint, Defendant denies both that the acts complained of were unlawful or that they occurred at any site located in Grand Rapids. Further answering paragraph 3, Defendant admits that the acts complained of occurred at the plant site in the City of Wyoming, Michigan.

4. Answering paragraph 4 of said Complaint, Defendant is without knowledge or information sufficient to form a belief as to the location of Plaintiff's residence but admits that Plaintiff is an adult.

5. Answering paragraph 5 of said Complaint, Defendant admits the allegations contained in paragraph 5, except Defendant says that Plaintiff was hired June 14, 1951.

6. Answering paragraph 6 of said Complaint, Defendant denies each and every allegation contained therein.

7. Answering paragraph 7 of said Complaint, Defendant denies each and every allegation contained therein. Further answering paragraph 7, Defendant admits executing a Labor Agreement with the UAW-AFL-CIO and its Local 277 in 1960 and again in 1965 containing among other provisions one which made

overtime work compulsory when assigned in accordance with the terms of said Agreement. Said provision was in effect when Plaintiff was discharged.

8. Answering paragraph 8 of said Complaint, Defendant denies each and every allegation contained therein.

9. Answering paragraph 9 of said Complaint, Defendant denies each and every allegation contained therein. Further answering paragraph 9, Defendant alleges that Plaintiff at the request of the Union prepared and issued a letter, dated September 20, 1965, interpreting parts of the Labor Agreement specifically providing that an employee would be relieved of his obligation to work overtime if said employee furnish a replacement considered qualified by the Company.

10. Answering paragraph 10 of said Complaint, Defendant admits the allegations contained therein except that Defendant denies the allegation that at all times while an employee of Defendant, Plaintiff refused to work scheduled Sunday overtime because of his religious beliefs. Further answering paragraph 10, Defendant alleges that Plaintiff was scheduled to work August 7, 1966 and August 14, 1966, both dates falling on Sunday, but a fellow employee worked as Plaintiff's replacement under the provisions of the interpretative letter of September 20, 1965. Defendant further alleges that after each violation of the Plant Rule, absence from work without reasonable cause, Plaintiff was warned and disciplined on a progressive basis finally resulting in his discharge.

11. Answering paragraph 11 of said Complaint, Defendant denies each and every allegation contained

therein. Further answering paragraph 11, Defendant alleges that Plaintiff told fellow employee Zagman prior to August 28, 1966 that Zagman was not to serve as his replacement on any further occasions.

12. Answering paragraph 12 of said Complaint, Defendant denies each and every allegation contained therein. Further answering paragraph 12, Defendant alleges that it excused an employee from Sunday work for a substantial and justifiable reason (attending a family reunion on a given Sunday). Defendant further denies that it has or did excuse such an employee from all Sunday work for such a reason.

13. Answering paragraph 13 of said Complaint, Defendant says that the allegations contained therein are conclusions of law and are denied. Further answering paragraph 13, Defendant alleges that it has made reasonable accommodations to Plaintiff's religious needs by establishing a replacement procedure as set forth in the September 20, 1965 letter of interpretation making possible the avoidance of all Sunday work. Defendant further alleges that there has been no discrimination as to Plaintiff because of religious beliefs or otherwise as evidenced by the prior investigation of this same subject matter and conclusions of no violation by the United States Office of Federal Contract Compliance and the Michigan Civil Rights Commission. Defendant further alleges that an arbitrator has interpreted the Labor Agreement and has upheld Defendant's position in denying grievances as to the same subject matter filed by Plaintiff protesting a disciplinary layoff and his subsequent discharge.

14. Answering paragraph 14 of said Complaint, because of lack of sufficient knowledge or information to form a belief, Defendant neither admits nor

denies same, and therefore leaves Plaintiff to his proof.

15. Answering paragraph 15 of said Complaint, Defendant denies each and every allegation contained therein except that Defendant has received a copy of the decision described in the Complaint as Exhibit A to which decision reference is made for the contents thereof.

16. Answering paragraph 16 of said Complaint, Defendant denies each and every allegation contained therein except that Defendant has received a copy of the letter described in the Complaint as Exhibit B to which letter reference is made for the contents thereof.

WHEREFORE, Defendant prays that this Court deny the relief prayed for in said Complaint and dismiss said Complaint with costs to the Plaintiff.

CROSS, WROCK, MILLER & VIESON
By: WILLIAM A. COUGHLIN, JR.
Attorneys for Defendant
Business Address:
4200 Penobscot Building
Detroit, Michigan 48226

OF COUNSEL:
FRED R. EDNEY
Assistant General Counsel
Reynolds Metals Company
6601 West Broad Street
Richmond, Virginia 23218

Dated: June 20, 1968.

INTERROGATORIES TO DEFENDANT
(Filed June 27, 1968)

NOW COMES the plaintiff, ROBERT KENNETH DEWEY, by his attorneys, Vander Veen, Freihofer & Cook, and addresses the following interrogatories to the defendant, to be answered under oath within 15 days in accordance with the Federal Rules of Civil Procedure:

1. What is the manufacturing function of the Reynolds Metals Company plant located in the City of Wyoming at Beverly and Porter Streets, S.W.? (Please provide a more comprehensive description of the plant's manufacturing function than simply that it produces "aluminum extrusions" and "aluminum billets").

2. How is the output production of the plant measured for any given unit of time? (That is, in dollars, sales volume, number of units produced, etc. per month or per year or per six month period, etc.)

3. How are the output requirements of the plant, described in the previous question and answer, defined, i.e. if output production is in number of units produced, is this for all departments, one particular department, etc.?

4. During the period from 1960 through 1966, inclusive, who were Reynolds Metals Company's principal customers with reference to the production of the plant in the City of Wyoming, Michigan?

5. Please state the output requirements these customers imposed upon the Reynolds Metals Company plant in Wyoming during the years 1960 through

1966, inclusively, in numbers of units produced by the Wyoming Plant, sales volume, etc.

6. During the period 1960 through 1966, inclusively, please state the number of employees employed at the Wyoming Plant of Reynolds Metals Company for each year above mentioned.

7. During the period 1960 through 1966, inclusively, please state the number of die repairmen or other employees qualified as die repairmen employed by the Wyoming plant and state the dates of such employment.

8. During the period 1960 through 1966, inclusively, state the number of employees required to work overtime and the date such overtime was required.

9. When were the die repairmen, employed at the Wyoming plant, first required to work overtime on a regular basis? (State the dates of such overtime and the number of die repairmen required to work overtime.)

10. When was compulsory overtime begun on a plant-wide basis?

11. What was the reason that compulsory overtime was scheduled on a plant-wide basis at the time answered in the previous question?

12. What are the job-skill requirements of a die repairman?

13. How do the die repairmen employed at the Wyoming plant of Reynolds Metals Company obtain their qualifications, experience, or training?

14. What length of training is required for one to become qualified as a die repairman suitable for employment in the Reynolds Metals plant in the City of Wyoming?

15. Please describe the nature of the work required of a die repairman at the Wyoming plant of Reynolds Metals Company.

16. Was it necessary for die repairmen to work overtime at any time during the period 1960 through 1966, inclusively?

17. If the answer to question 16 is in the affirmative, please state the reason that said die repairmen were required to work on an overtime basis.

18. With reference to paragraph 11 of the defendant's Answer, please state the source of the information upon which defendant relies in stating "Plaintiff told fellow employee Zagman prior to August 28, 1966, that Zagman was not to serve as his replacement on any further occasions."

19. Please give the names, addresses, and job titles (if employees) of all persons defendant will call as witnesses in its behalf.

20. Please state the name and address of the employee or employees directly in charge of the Wyoming plant during the period 1960 through 1966, inclusively.

21. Please state the names and addresses of all supervisory personnel in charge of the die repairmen during the period 1960 through 1966, inclusively.

22. Who scheduled overtime when overtime was deemed necessary during the period 1960 through 1966, inclusively? (If more than one employee, please state the names of all such employees and their dates of employment when in charge of scheduling such overtime.)

23. With reference to question 22, please state the names and addresses of persons in charge of scheduling overtime only for the die repair section during the period 1960 through 1966, inclusively, if a different person from the person in charge of scheduling overtime as set forth in the answer to question 22.

24. What is the defendant's reason for refusing to find substitute employees to work overtime on Sundays so as to accommodate other employees' religious beliefs?

25. How many die repairmen were discharged during the period 1960 through 1966, inclusively, for refusal to work on Sundays because of religious convictions?

26. What was the plaintiff's rate of pay (hourly rate) immediately before his dismissal?

27. Please state the average number of hours per week die repairmen were employed from September of 1966 to the present date.

28. Please provide a specific and detailed list of the fringe benefits provided to the die repairmen employed by Reynolds Metals Company from September 1966 through the present date.

29. Please provide a specific and detailed list of all fringe benefits accrued to the plaintiff immediately before his dismissal in September of 1966.

30. Please state the nature of the arrangement by which the fringe benefits as described in the previous two answers are provided. (For example, does the employer contribute a given amount toward some particular fund based upon an employees' rate of pay; how are these benefits determined, and where are the records of the cumulative benefits for all employees kept?)

31. Who is presently in charge of the records which reflect the information requested in the previous three questions?

VANDER VEEN, FREIHOFER & COOK
By: Peter R. Tolley
Attorneys for Plaintiff
Business Address:
950 Union Bank Building
Grand Rapids, Michigan

Dated: June 26, 1968.

ANSWERS TO PLAINTIFF'S INTERROGATORIES
(Filed August 14, 1968)

Defendant, Reynolds Metals Company, in answer to the interrogatories filed by Plaintiff, Robert Kenneth Dewey, says:

1. Makes alloy billets from virgin aluminum then extrudes metal to form shapes and tubing. These extruded shapes are then heat-treated, if required, straightened, cut to desired length, inspected, packed and shipped.

2. Pounds per month.

3. Plant wide--all departments necessary to produce end product.

4. The table below is a representative breakdown of the distribution of our customer shipments in:

	1961	1966
Automotive, truck, truck trailer	30%	10%
Architectural, building products	20	5
Industrial, electrical	15	20
Aircraft, government and private	10	10
Railroad	5	5
U.S. Government	5	15
Commercial domestic	5	33
Marine	5	2

In 1961 our rated capacity was 2 to 3 million pounds per month or approximately 25 to 35 million pounds per year.

In 1966 our rated capacity was 3 to 4 million pounds per month or approximately 30 to 48 million pounds per year.

5. Answered under No. 4.

6. January 1960--317
January 1961--298
January 1962--344
January 1963--270
January 1964--288
January 1965--288
January 1966--290

7. 1960--14--1950 through 1959
1961--15--1950 through 1959
1962--15--1950 through 1959
1963--13--1950 through 1959

1964--14--1950 through 1959
1965--14--1950 through 1959
1966--14--1950 through 1959

8. The compilation of the statistics required to answer this question is excessively burdensome. However, as evidence of the amount and distribution of overtime during the periods when the Dewey unauthorized absences occurred, the following is submitted:

August 28, 1966--190 of a total of 255 employees in the Plant worked.
September 4, 1966--117 of a total of 253.
September 11, 1966--124 of a total of 258.

There was significant overtime scheduled on twenty-four (24) of thirty-seven (37) Sundays between January 1, 1966 and September 11, 1966.

9. Since March 1960 in accordance with Section 3 of Article IX of the Labor Agreement. The compilation of the statistics required to further answer this question is excessively burdensome. As evidence of the overtime worked by die repairmen when the Dewey unauthorized absences occurred, the following is submitted:

August 28, 1966--7 of 11 employees in Die Repairman.
September 4, 1966--4 of 11 employees in Die Repairman.
September 11, 1966--5 of 11 employees in Die Repairman.

10. Since March 1960 in accordance with Section 3 of Article IX of the Labor Agreement.

11. The competitive nature of the business. During late 1965 and early 1966 the Grand Rapids Plant work schedule increased to such an extent as to require work not only on Saturdays but also on a number of Sundays. The production increase was occasioned by an increase in commercial business related to the increase in the general economy and by demands from the Vietnamese conflict arising from the fact that the Plant supplies product to prime contractors of the U.S. Government, the missile industry and the U.S. Government itself.

12. The primary duties consist of polishing, repairing and revising extrusion dies to produce extruded metal of proper contours, dimensions, and surface conditions.

13. Refer to the SUPPLEMENTAL AGREEMENT dated September 20, 1965, entitled SKILLED TRADES, beginning on page 57 of the AGREEMENT between the COMPANY and the UNION which is attached hereto and is likewise dated September 20, 1965. There are 9 steps (in the training program) of 440 hours each in order to qualify as a Die Repairman.

14. Refer to the SUPPLEMENTAL AGREEMENT between the COMPANY and the UNION under SKILLED TRADES mentioned above.

15. See answer to question No. 12.

16. Yes.

17. When other departments are scheduled to work overtime, the services of die repairmen are also needed.

18. Record of the Proceedings and testimony taken In the Matter of the Arbitration Between — REYNOLDS METALS COMPANY and UAW, LOCAL NO. 277 before Arbitrator Mark Kahn, on April 27, 1967.

19. In accordance with a telephone conversation with Peter Tolley, Esq. it is our present intention to call as a witness only Robert A. Lies who was the Personnel Manager during the period with which the suit is concerned.

20. 1960--William R. Comber, Plant Manager
1963--Charles C. Hudgins, Plant Manager (to present time).

21. Ray Call, 9832 Ivanrest Road S.W., Byron Center, Michigan; James Goulooze, 229 Lemyra S.E., Grand Rapids, Michigan; Benjamin Hall, 1937 Paris S.E., Grand Rapids, Michigan; Gerald Johnson, 3234 Ivanrest Road, Grandville, Michigan; Ronald Newberry, Unknown; Harold Oleson, Unknown; Henry Wilcoxson, 7453 Harmon Lane, Jenison, Michigan.

22. All supervisory personnel.

23. Supervisors shown in answer to question No. 21.

24. If one were to suggest that the Company could take one further step of accommodation, by the Company obtaining a replacement for Dewey, it is the position of the Company that this could not be done without undue hardship on the conduct of the business. Specifically, the obligatory overtime clause in the Labor Agreement was hard won in contract negotiations. Such a clause was necessary at

this Plant in order to enable the Plant to be worked six and seven days when customer demands required. If this Plant could not be worked overtime when necessary, the competitive nature of the business would require the Plant to be located elsewhere where it could compete with its industrial competitors such as Alcoa, Kaiser, etc. To remove the obligation of getting a replacement from Dewey the Company would waive the compulsory part of the obligatory overtime clause and would in effect relieve Dewey of his obligation to work overtime. If such were done for Dewey, as an accommodation, the same would have to be done for other employees who so requested relief for various reasons in order to have impartial administration of the contract. To thereafter refuse others the same consideration is obviously unfair and would result ultimately in an arbitrator directing that all be treated the same as Dewey--i.e., the Company obtain the replacements. This then would effectively relieve all other employees of their overtime obligation and in the opinion of management render it impossible to operate the Grand Rapids Plant.

25. One.

26. $3.320.

27. 44.3 average hours per week.

28. See the following attached books:

(1) AGREEMENT between Reynolds Metals Company, Grand Rapids, Michigan and the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America UAW-AFL-CIO and Local 277 dated September 20, 1965 and referred to in the answer to question No. 13.

(2) YOUR REYNOLDS GROUP INSURANCE PROGRAM--Hourly Employees.

(3) Reynolds Metals Company PENSION PLAN (1966).

(4) Reynolds Metals Company SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN. (SUPPLEMENTAL VACATION and BENEFITS PLAN was eliminated prior to 1965 Agreement.)

29. None.

30. All benefits are paid for in full by the Company; the benefits being determined by the contractual plans shown under question No. 28, the records for which are kept at the Grand Rapids Plant.

31. Gordon L. Fox, Personnel Manager.

/s/ WILLIAM A COUGHLIN, JR.
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965-8135

OPINION DENYING DEFENDANT'S MOTION TO DISMISS
(Filed October 18, 1968)

This is an action arising under Title VII of the Civil Rights Act of 1964, 42 USC §2000 (e), which provides, inter alia, for relief against religious discrimination in employment.

Plaintiff, Robert Dewey, was employed by defendant from July 14, 1951, until September 12, 1966. Dewey held a number of jobs with defendant; at the time of his termination he was employed as a die repairman. Since 1962, plaintiff has been a member of the Reformed Church, and, consistent with his religious beliefs as a member of that church, he has refused to work on Sundays.

In 1960, a new labor-management agreement was executed between the UAW-AFL-CIO and defendant Reynolds Metals Co. That agreement provided that the company could schedule compulsory overtime work, including Sundays. This provision was carried forward in the 1965 labor-management agreement, which was in effect at the time of the termination which is the basis of this action.

From 1960 until late 1965, the compulsory overtime provision was not exercised and the company functioned on a five-day work week schedule. Late in 1965, the defendant began scheduling Sunday overtime, and in a bulletin dated September 20, 1965, the defendant agreed to allow employees to be relieved of Sunday work if they obtained a qualified replacement.

Dewey was scheduled to work on August 7, 1966, and August 14, 1966, both Sundays. Defendant alleges that, at plaintiff's request, a fellow employee worked as his replacement under the provisions of the bulletin dated September 20, 1965. However, Dewey did not report for work on August 28, 1966, September 4, 1966, or September 11, 1966, all Sundays, having previously made it expressly known to the defendant that it was against his religious beliefs to work on Sundays and that he would not procure a substitute because it was his belief that if

it was not right for him to work on Sundays, it would not be right to encourage another to work, regardless of the substitute's religious beliefs. Plaintiff said that the company should obtain a substitute so as to accommodate his religious beliefs.

The September 11 absence resulted in a third written offense and plaintiff was terminated pursuant to Company Rule 11. Believing that he had been discriminatorily discharged because of his religion, plaintiff filed a grievance to this effect, in accordance with the provisions of the 1965 collective bargaining agreement. The grievance was processed through various stages of the grievance procedure and was decided adversely to the plaintiff. An arbitration hearing was held April 27, 1967, and in an opinion and award dated June 29, 1967, arbitrator Mark L. Kahn decided against plaintiff. At the hearing, plaintiff was represented by the union in the persons of the International Representative and the chairman of the bargaining committee. He was not represented by an attorney, although the company was. A post-hearing brief was filed by the company, but no brief was filed by the union.

The arbitrator's decision was based in part on "the fact that a grievance protesting the discharge of Knight [another employee] in August 1966 for refusing Sunday work on religious grounds was later withdrawn [by the union]." (Arbitration award, at 8.)

Another reason given was the finding of the arbitrator that "the agreement does not permit a regular and continuing refusal of all Sunday work on religious grounds." (Arbitration award, at 8.)

Plaintiff thereupon filed a similar charge with the Michigan State Civil Rights Commission. The Commission found that there were insufficient grounds upon which to issue a complaint against defendant.

Plaintiff then filed a charge with the Equal Employment Opportunity Commission alleging that he had been discriminated against because of his religion. The Commission investigated the charge and determined that there was reasonable cause to believe that the employer had violated the provisions of Title VII. The Commission, unsuccessful in its attempts to obtain a conciliation agreement, notified the plaintiff of his right to bring a suit under Section 706 of the Act. This suit was instituted on May 31, 1968, and it is now before the court on a motion filed by defendant to dismiss the complaint on the ground that the plaintiff, by pursuing the grievance procedure under the collective bargaining agreement, had made a final, binding election of remedies and is therefore precluded from maintaining a suit to enforce his rights under Title VII.

The relevant legal issues easily divide into two: (1) whether by pursuing the grievance procedure to a conclusion, plaintiff made an election of forums which now precludes his suit in this court; (2) whether the constitutional guarantee of freedom of religion permits this court to review the arbitrator's decision or make a decision on the merits. Each of these issues will be discussed in turn.

I.

Defendant argues that by pursuing his remedy under the grievance procedure, plaintiff made a binding election of forums. Defendant relies on

Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332 (S.D. Ind. 1967), which granted a motion to dismiss in a case involving a discharge for alleged improper discrimination based on sex. That court said at pages 337-338:

> "It is also the belief of the court that the employee should not be permitted to proceed on the same allegedly wrongful incidents both in the court and pursuant to his contractual remedies."

The reason for this requirement of an election was that "it would be inequitable and unconscionable to subject the defendant Colgate to two series of extensive litigation, one series in this court and then another series under the labor contract." Id. at 366-7.

The second case relied upon by defendant is Washington v. Aerojet-General Corp., 282 F. Supp. 517 (C.D. Cal. 1968). That case involved a charge of racial discrimination, and the court refused to go as far as the court in Bowe, supra. In Washington, a settlement had been reached between the union and the company prior to arbitration. The court held that once that settlement was accepted by both sides, the employee would be precluded from continuing with any court action under the Civil Rights Act.

Both these cases are distinguishable from the case at bar. The Bowe case dealt with alleged discrimination on the basis of sex, whereas this case deals with a discrimination against the freedom of religion, one of the most cherished and protected constitutional rights. Washington involved a settlement agreed to by both sides, a far different situation

than is presented in this case. Both decisions are now on appeal.

In addition to being distinguishable, these cases should be critically analyzed to determine whether their reasoning is valid. The reasoning given by the Bowe court itself argues against the decision in that case:

> "The court finds a fundamental difference between a claim for the violation of a collective bargaining agreement and a claim for the violation of the Civil Rights Act of 1964. The latter is a statutory embodiment of constitutional rights that all persons are entitled to enjoy, while the former has as its primary purpose the maintenance of industrial peace between labor and management. It is the belief of the court that an employee has the right to come before the Court and assert his right under the Civil Rights Act of 1964 without regard to any contractual remedies also available to him." 272 F. Supp. at 337.

The doctrine of election of remedies has traditionally been applied in cases where the same or nearly identical issues were being pursued in two forums. See, e.g., Penn Gen. Cas. Co. v. Commonwealth of Pa., ex rel Schnider, 294 U.S. 189 (1935). This doctrine has also been used in the labor field relative to proceedings both before an arbitrator and then before the National Labor Relations Board on the same issue. The standards set forth in Spielberg Mfg. Co., 112 NLRB 1080 (1955), and Raytheon Co., 140 NLRB 883 (1963), are instructive: (1) The factual issues before the arbitrator and the Board must be indentical; (2) the

hearing and evidence presented must deal adequately with all factual issues; (3) the arbitrator must have decided the factual issues involved before the Board; (4) the hearing must be fair and regular in all respects; (5) the decision of the arbitrator must be in accordance with the law.

The factor to be emphasized in the instant case is whether the arbitration hearing dealt with the same issues that are present in this proceeding before this court. The issues treated by the arbitrator were wholly different from the issues raised in this Civil Rights Action. The labor contract involved, Article XI, Section 2, Step 5, stated:

> "The arbitrator shall have authority to interpret this agreement for the purpose of settling the grievance, but he shall have no authority to add to or detract from, or change this agreement, or arbitrate wages for new changes, jobs, or production standards."

Under this provision of the contract, the arbitrator correctly limited himself to the contract language. At no time did the arbitrator deal with the issues present in this case, that is, the issues relevant to the Civil Rights Act and the First Amendment.

It is understandable that any union member would first proceed to raise any rights he felt were due him under the contract. Proceeding first through arbitration is in accord with federal labor law. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574 (1960). Plaintiff should not be penalized for first proceeding with his contractual remedies through the arbitration process,

as preferred and indeed mandated by federal labor law. He should retain his rights to also bring a civil rights action. This reasoning is especially justified in this case, where the employee was not represented by counsel at the arbitration hearing, although the company was, and where the union did not file a brief on behalf of the employee though the company filed a brief on its behalf.

Under all these circumstances, the arbitration award should not preclude an action in this court based upon a statute rather than the collective bargaining agreement. To hold otherwise would be to require the employee to have come to this court without attempting a settlement through the contractual processes, as preferred by the national labor law; plaintiff would also have been required to choose between two different remedies when both remedies are provided to insure that plaintiff's contractual, statutory and constitutional rights are protected. When rights of this type are involved, they outweigh the interest of the company-defendant in avoiding the inconvenience and expense of multiple actions. Thus, a trial should be held on the merits of plaintiff's claim that defendant has violated the Civil Rights Act.

II.

Defendant argues that the First Amendment does not apply to labor contracts or proceedings thereunder, because they are not actions of the government, but are rather purely private activities. Defendant further argues that even if the First Amendment could be said to apply to this situation, the decision of the arbitrator should be final and conclusive with respect to plaintiff's First Amendment rights.

Both defendant's arguments are invalid. First, the arbitration proceeding cannot be viewed as purely a private one. The National Labor Relations Act and the famous Triology cases(1) clearly establish a federal labor policy of arbitration as a substitute forum for the public judiciary in which to dispose of industrial disputes.

Since the arbitration tribunal or arbitration proceedings are in many instances a substitute for traditional judicial remedies, it follows that the rules of due process and other constitutional protections must extend to the substitute proceedings lest the courts, through approval of arbitration agreements in arbitration proceedings, support proceedings which result in the deprivation of statutory and constitutional rights. If this grievance-arbitration system, which exists as a result of court approval, is permitted to dispose of disputes involving substantial rights without heeding constitutional protections, the courts will find themselves supporting and giving credence to decisions, which if rendered by the courts would be a violation of the free exercise of religion clause of the First Amendment or some other essential constitutional protection.

The courts cannot leave to the arbitrator final decisions regarding constitutional rights. This is especially true in the instant case, where the arbitrator was limited to the contract in rendering his decision.

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(1) United Steelworkers v. American Mfg. Co., v. Warrior & Gulf Nav. Co., v. Enterprise Wheel & Car Corp., 363 U.S. 564 (1960).

This court is not limited by the contract, but also has before it the Civil Rights Act and the Constitution of the United States. The constitutional issue is not one which can be passed over lightly, as was done by the arbitrator in a sentence of two. The constitutional issue is whether defendant effectively denied plaintiff the right of free exercise of his religion by conditioning plaintiff's right to work on his willingness to forego his religious beliefs or to compromise them by encouraging someone else to work on Sunday. An analogous choice of this type was found to be unconstitutional in Sherbert v. Verner, 374 U.S. 398 (1963), where a Seventh Day Adventist was forced to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion in order to accept work on the other hand.

The court at this time is not expressing an opinion as to the validity of plaintiff's claims. The court is rather refusing to allow a decision by the arbitrator to be the final one with respect to plaintiff's constitutional rights. The right in question, freedom to exercise one's religion, is too precious to require plaintiff to accept an arbitrator's decision regarding it. Again, the guiding principle is that plaintiff should not be penalized and should not be precluded from his rightful statutory and constitutional remedies because he followed the mandated practice under federal law of first submitting his dispute to the private grievance procedure.

For all these reasons the motion to dismiss is denied.

Dated: November 5, 1968.

/s/
District Judge

STIPULATION OF FACTS
(Filed March 17, 1969)

NOW COMES the Plaintiff by his attorneys, Vander Veen, Freihofer & Cook and the Defendant by its attorneys Cross, Wrock, Miller & Vieson, and hereby mutually stipulate and agree that the following facts are true and that proofs need not be presented at the trial of the within cause in support of the matters to which the parties hereby stipulate.

1. Plaintiff was employed by Defendant at its Wyoming, Michigan plant on June 14, 1951, holding various jobs until he became a die repairman, which was the job he held at the time of his discharge September 12, 1966.

2. Defendant is a corporation with its executive offices in Richmond, Virginia and maintains a "job type" plant in Wyoming, Michigan where it produces on an order basis aluminum extrusions and aluminum billets for such industries as architecture, building, transportation, aircraft and missile.

3. Prior to 1964 the plant operated on a five day weekly schedule. Because of increased business, during 1964 and 1965 the plant operated on "five plus" days weekly schedule. During late 1965 and 1966 the plant operated on a "six plus" days weekly schedule utilizing Saturdays regularly and requiring numerous Sunday work schedules. Between January 1, 1966 and September 11, 1966, Sunday production took place on twenty-four (24) of thirty-seven (37) Sundays.

4. The production and maintenance employees at Defendant's plant (which classifications include that of Plaintiff) have been and continue to be represented by the International Union, United Automobile,

Aerospace and Agricultural Implement Workers of America (now known as UAW) and its Local 277 (hereinafter called the Union).

5. Plaintiff was at all times during his employment by Defendant a member of the Union in good standing.

6. Prior to the 1960 Labor Agreement between Defendant and the Union, overtime was performed on a basis that was voluntary on the part of each employee and under such circumstances the scheduling of production was made impossible on certain overtime days.

7. The 1960 Labor Agreement and subsequent Labor Agreements, including the 1965 Labor Agreement, between Defendant and the Union include a section giving Defendant the right to set overtime schedules and make it compulsory for the employees to work such schedules unless they have a substantial and justifiable reason for not doing so. The section in question in the 1965 Labor Agreement is found at Article IX, Section 3, and reads as follows:

> "All employees shall be obligated to perform all straight time and overtime work required of them by the COMPANY except when an employee has a substantial and justifiable reason for not working; provided, however, that no employee shall be required to work more than twelve (12) continuous hours without his consent."

(Exhibit A attached hereto).

8. The 1965 Labor Agreement also provides, in Article IX, Section 4, that overtime work shall

be divided as equally as possible among employees in each job classification in each department; that if less than all of the qualified employees in a classification in a department are needed on other than a normal straight time work day, the number required will be scheduled in accordance with the overtime chart and when the required number of employees cannot be obtained in this manner, overtime is to be assigned by the Defendant Employer among the employees who are offered such overtime in the inverse order of their seniority.

9. In response to a Union objection to the compulsory overtime clause, the Defendant Employer, under date of September 20, 1965, issued an interpretation of the Labor Agreement which said in effect that any employee assigned to overtime could be relieved from that assignment by arranging for another qualified employee to replace him. This system of employees furnishing their own replacements has been utilized extensively since September 1965. (Exhibit B attached hereto).

10. Defendant established in 1957 Plant Rules and a copy of such Rules was posted in each department. Plant Rule 11 includes "absence from work without reasonable cause" and calls for a warning for the first offense, a one week layoff for the second offense and discharge for the third offense. Said Plant Rules also state: "Depending upon the seriousness of the offense and other factors in the judgment of Management, the Company reserves the option of imposing a lesser penalty than that indicated." (Exhibit C attached hereto).

11. Plaintiff has been a member of the Faith Reformed Church since December 4, 1961. This church is a local church in the Reformed Church of America.

12. Plaintiff never volunteered for Sunday overtime work from December 4, 1961 to date of discharge because of his religious beliefs.

13. Plaintiff did volunteer for overtime work on days other than Sunday since becoming a member of the Faith Reformed Church.

14. Plaintiff was scheduled to work overtime on Sunday, November 21, 1965 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff refused to work because of his religious beliefs; he was given a verbal warning; was advised of the necessity (in Defendant's judgment) of Defendant scheduling work on a seven day basis and was advised that a repetition of his conduct would lead to disciplinary action under Plant Rule 11.

15. Plaintiff was scheduled to work overtime on at least five (5) Sundays from January 1966 to August 1966 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff did not work on such assigned days but did obtain replacements on each of the days in question in accordance with the replacement system referred to in Paragraph 9 above and as more specifically set forth in Exhibit B attached hereto.

16. Plaintiff was scheduled to work overtime on Sunday, August 28, 1966 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff refused to work because of his religious beliefs and refused because of his religious beliefs to obtain a replacement in accordance with the replacement system referred to in Paragraph 9 above and as more specifically set forth in Exhibit B attached hereto. At this time Plaintiff told a fellow employee, Jake Zagman, who had been serving as

his replacement that Plaintiff would not request said fellow employee to serve as his replacement again. Plaintiff was given a written warning for violation of Plant Rule 11. (Exhibit D attached hereto). Seven (7) of eleven (11) employees in Plaintiff's classification worked on said day and of a total of two hundred fifty-five (255) employees in the plant, one hundred ninety (190) worked.

17. Plaintiff was scheduled to work overtime on Sunday, September 4, 1966 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff refused to work because of his religious beliefs and refused because of his religious beliefs to obtain a replacement in accordance with the replacement system referred to in Paragraph 9 above and as more specifically set forth in Exhibit B attached hereto. Plaintiff was given a written warning together with a disciplinary layoff of three (3) days for violation of Plant Rule 11. (Exhibit E attached hereto). Four (4) of eleven (11) employees in Plaintiff's classification worked on said day and of a total of two hundred fifty-three (253) employees in the plant, one hundred seventeen (117) worked.

18. Plaintiff filed Grievance No. 621 dated September 7, 1966 with Defendant. (Exhibit F attached hereto).

19. Plaintiff was scheduled to work overtime on Sunday, September 11, 1966 pursuant to the compulsory overtime provisions of the Labor Agreement. Plaintiff again refused to work because of his religious beliefs and also refused because of his religious beliefs to obtain a replacement in accordance with the replacement system referred to in Paragraph 9 and as more specifically set forth in Exhibit B attached hereto. Plaintiff was discharged for violation of Plant Rule 11. (Exhibit G

attached hereto). Five (5) of eleven (11) employees in Plaintiff's classification worked on said day and of a total of two hundred fifty-eight (258) employees in the plant, one hundred twenty-four (124) worked.

20. Plaintiff filed Grievance No. 629 which was received by Defendant's Personnel Department on September 19, 1966. (Exhibit H attached hereto).

21. Both the Defendant's interpretation and past practice indicate that the Defendant cannot compel an employee to accept an overtime assignment in other than his own classification.

22. On and after August 28, 1966 there were two (2) employees who were in other classifications, but who nonetheless were qualified as die repairmen.

(a) One of the aforementioned employees, Jake Zagman, worked on August 28, 1966 and on September 4, 1966. Zagman did not work on September 11, 1966 but was available for work; however, Defendant could not compel Zagman to work outside his classification.

(b) William Boyer, the second of the two aforementioned employees, worked on August 28, 1966 and on September 11, 1966. Subsequent to September 4, 1966 but prior to September 11, 1966 he had been reclassified as a die repairman and worked in such capacity on September 11, 1966. Boyer did not work on September 4, 1966 but was available for work; however, Defendant could not compel Boyer to work outside his classification.

23. If Plaintiff were to be relieved of the obligation of obtaining his replacement in accordance with the replacement system referred to in Paragraph 9 above, it is Defendant's contention that this would result in a waiver of the compulsory overtime provisions of the Labor Agreement.

Further, Plaintiff does not by this Stipulation intend agreement with or acceptance of Defendant's contention; but rather, the parties have so stipulated in order to include that which Defendant included as a defense in its Answer No. 24 to Plaintiff's Interrogatory No. 24, which Answers and Interrogatories have hereinbefore been filed.

24. The sincerity of Plaintiff's personal religious beliefs is not contested by the Defendant.

25. Plaintiff had expressed his religious beliefs against Sunday work to the Defendant prior to having been scheduled for the above three (3) Sundays in 1966.

26. Prior to the discharge of Plaintiff, Defendant had taken disciplinary action as to a number of other employees who refused overtime work assignments on Sunday because of their religious beliefs when scheduled pursuant to the compulsory overtime provisions of the Labor Agreement. The following are the disciplinary actions taken: Written warnings were issued to four (4) employees; three (3) day layoffs were given to three (3) employees; four (4) employees were discharged, which number included two (2) supervisors. Defendant had also taken disciplinary action as to other employees who refused overtime work assignments on days other than Sunday when scheduled pursuant to the compulsory overtime provisions of the Labor Agreement.

27. Pursuant to the Collective Bargaining Agreement between Defendant and the Union, Plaintiff's grievances pertaining to his three (3) day layoff and his discharge were processed through the various steps of the Grievance Procedure, finally resulting in the grievances being submitted to arbitration. Under date of June 29, 1967 the arbitrator sustained the layoff and the discharge and denied the grievances. (Exhibit I attached hereto).

28. During the period 1960 to 1966 inclusive, no employee employed by Defendant at its Wyoming plant in the die repair classification refused to work on Sunday because of religious beliefs and refused to obtain a replacement in accordance with the replacement system referred to in Paragraph 9 above, except the Plaintiff Dewey.

29. On or about September 16, 1966, Plaintiff filed with the Michigan Civil Rights Commission an application for the issuance of a Complaint alleging that he had been subjected to discriminatory treatment and discharged because of religious beliefs. Defendant was advised of the filing of such application by letter from the Civil Rights Commission dated September 19, 1966. (Exhibit J attached hereto).

30. Under date of December 13, 1966 (mailed on December 14, 1966), the Michigan Civil Rights Commission issued a Notice of Disposition and Order of Dismissal stating that the Commission had found insufficient grounds on which to issue a Complaint and that the application for Complaint was denied. (Exhibit K attached hereto).

31. Under date of January 4, 1967, Plaintiff filed a charge with the Equal Employment Opportunity

Commission alleging discrimination on the basis of religion. (Exhibit L attached hereto). The charge was served on Defendant on July 19, 1967.

32. Under date of January 5, 1968 the Equal Employment Opportunity Commission, notwithstanding the recommendation of the Regional Director of the Cleveland, Ohio Regional Office that the Equal Employment Opportunity Commission find no probable cause, issued a letter to Defendant Employer stating that the Commission had determined that there was reasonable cause to believe that Defendant Employer had engaged in unlawful employment practices under Title VII of the Civil Rights Act of 1964. (Exhibit M attached hereto).

33. Following conciliation efforts by the Equal Employment Opportunity Commission, said Commission in a letter dated May 3, 1968 advised Plaintiff of the failure of conciliation efforts and notified Plaintiff that he could within thirty (30) days institute a civil action in the appropriate Federal Court alleging an unlawful employment practice. Within thirty (30) days after said letter, Plaintiff commenced this action.

34. The foregoing Stipulation is intended to cover all facts except those relating to Plaintiff's alleged damages. If the parties are not able to stipulate as to such alleged damages, there will be a further hearing covering the matter of damages.

Respectfully submitted,

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Dated: 3-15-69
OF COUNSEL:
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Assistant General Counsel
Reynolds Metals Company
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TRIAL EXHIBIT A
Article IX
OVERTIME PROVISIONS

Section 1.

(a) All work performed in excess of eight (8) hours in any twenty-four (24) hour period, or all work performed in excess of forty (40) hours in any one work week shall be paid for at the rate of time and one-half.

(b) Double time and one-quarter shall be paid for work performed on the holidays enumerated in Article X, Section 1.

(c) Time and one-half shall be paid for work performed on Saturdays.

(d) Double time shall be paid for work performed on Sundays.

(e) Exception to the above sub-paragraphs (c) and (d) shall be made where continuous operation

is necessary. On the seventh consecutive day worked within a work week, double time shall be paid for work performed on the seventh day. Time and one-half shall be paid for all work performed on Sunday. Holiday hours shall be used in computing time for overtime if an employee would otherwise have been scheduled to work if the holiday had not occurred.

Section 2. In the event premium time is applicable to the same hours worked under any two or more provisions of this Agreement, only the single highest premium rate shall be paid.

Section 3. All employees shall be obligated to perform all straight time and overtime work required of them by the COMPANY except when an employee has a substantial and justifiable reason for not working; provided, however, that no employee shall be required to work more than twelve (12) continuous hours without his consent.

Section 4. Insofar as is practicable without reducing the efficiency of the plant, overtime work in each job classification shall be divided as equally as possible among the employees of each department within their job classification. The distribution of overtime opportunities shall be carried out in the following manner:

(a) If an employee in any classification is to be worked beyond the end of and continuous with his shift on a normal straight time day, the opportunity to perform such work shall be offered, in accordance with the overtime chart, to all employees on that same shift in that classification within that department who are qualified to perform the work and who are present and available. If an insufficient number of such employees accept the offer of such

overtime, the required number of employees shall be selected by the COMPANY from among such employees in the inverse order of their seniority.

(b) If an employee in any classification is to be worked prior to the start of his regular shift but continuous therewith on a normal straight time day, the opportunity to perform such work shall be offered, in accordance with the overtime chart, to all employees on that same shift in that classification within that department who are qualified to perform the work. If an insufficient number of such employees accept the offer of such overtime, the required number of employees shall be selected by the COMPANY from among such employees in the inverse order of their seniority.

(c) If, in addition to employees obtained under the above procedure, other employees are needed to perform any work on an overtime basis on a normal straight time day in a classification within a department, the COMPANY will attempt to obtain such additional employees by offering such overtime work, in accordance with the overtime chart to the other employees within that classification in that department who are qualified to perform such work, unless it is clearly impractical to do so. Where the foregoing procedure is clearly impractical, such overtime work will be offered within the Production Department, to qualified employees in the applicable Line of Progression from those employees who are present and available. Where the foregoing procedure is clearly impractical in departments other than the Production Department, such overtime work will be offered to qualified employees within the department who are present and available. If sufficient employees are not obtained in that manner the COMPANY may select any qualified employee to perform such work.

(d) When less than all the employees in a classification within a department who are qualified to perform the work are needed to work on an overtime basis on other than a normal straight time day, the COMPANY will schedule the needed number of employees who are qualified to perform such overtime work in accordance with the overtime chart. Such schedule shall be posted not later than the Thursday work day of the week involved. If an employee scheduled to work such overtime notifies the COMPANY prior to 5:00 P.M. Friday that, for a substantial and justifiable reason, he would prefer not to work such overtime, the COMPANY will attempt to obtain a qualified replacement by offering, in accordance with the overtime chart, the work to other employees within that classification in that department who are qualified to perform the work but who had not been scheduled to work such overtime. If a qualified replacement is not obtained, the required number of employees shall be selected by the COMPANY from among the employees who were offered such overtime in the inverse order of their seniority.

(e) If employees are needed to work overtime on other than a normal straight time day who have not been obtained under the scheduling and replacement process set forth in (d) above, the COMPANY will attempt to obtain the needed employees by offering such overtime work, in accordance with the overtime chart, to the employees within that classification in that department who are qualified to perform such work, unless it is clearly impractical to do so. Where the foregoing procedure is clearly impractical, the COMPANY may select any qualified employee to perform such work.

(f) When all employees within a classification in a department have been scheduled to work overtime on other than a normal straight time day, or

in circumstances arising from unexcused absenteeism of employees schedules to work overtime on such a day, the procedures set forth in (d) and (e) above shall not apply.

(g) If a vacancy occurs that creates overtime, employees within the classification who are present and available in the plant, where said vacancy occurs will have first choice at said overtime.

If it shall become necessary to call an employee from outside the plant those employees within the classification in which the vacancy occurs shall be called in accordance with the overtime chart.

Section 5. If an employee who should have been offered overtime under the provisions of Section 4 is overlooked and if the work which such employee would have performed is actually performed at overtime rates:

(a) by an employee not in the same classification as the overlooked employee, the overlooked employee shall be paid the amount he would have received had he performed such work.

(b) by an employee in the same classification as the overlooked employee, when the overlooked employee brings the matter to the attention of the COMPANY, the COMPANY will offer such employee the next available overtime within his classification if he is qualified to do such work and in the event the COMPANY fails to offer such employee such overtime the COMPANY will pay the employee the amount such employee would have earned had the COMPANY not overlooked such employee the second time.

Section 6. The COMPANY will maintain and post each week the overtime charts for each department showing the relative positions of the employees with respect to the overtime worked and/or charged.

Section 7. Any employee who is called in before his regular shift for work continuous with his regular shift shall not be sent home prior to the end of his regular shift.

Section 8. The COMPANY will not change the present established shift schedules without giving at least forty-eight (48) hours prior written notice to the UNION of the reasons therefor; provided however, that the COMPANY may not, without the consent of the UNION, change the present established shift schedules more than one (1) hour earlier or later than the present established shift schedules. When operating conditions make it necessary to change the schedules of any employees, the shift starting time for such employees shall be uniform for the entire work week and such employees shall be paid the shift differential applicable to the established shift schedule in which the majority of such employees' time is worked.

TRIAL EXHIBIT B

September 20, 1965

Mr. Sam Sella, Jr.,
Chairman, Negotiating Committee
Local 277, UAW-CIO
Grand Rapids, Mich.

Dear Mr. Sella:

At the request of the Committee, of which you are Chairman, we are clarifying the Company's

position regarding the meanings of certain parts of the contract agreed to during recent contract negotiations.

ARTICLE IX, Section 3. OVERTIME PROVISIONS. The COMPANY will relieve an employee of the obligation of performing overtime work under this Section under the following conditions:

(a) The employee furnishes a qualified replacement to perform the scheduled overtime.

(b) Questions of qualification will be determined by the Foreman.

(c) The employee working as a replacement will receive the rate of the job performed.

ARTICLE XIV. REDUCTION OF FORCE.
and
ARTICLE XIX. PROMOTIONS AND FILLING OF VACANCIES.

The COMPANY considers present employees within a Line of Progression to be eligible to be trained to perform any job, that they obtain under the provisions of the above Articles, within that Line of Progression unless otherwise declared unqualified for such training by agreement between the COMPANY and the UNION. Training of employees in the Production Department Pool classifications will be limited to the lowest direct successive step in a Line of Progression.

SUPPLEMENTAL AGREEMENT
Concerning SKILLED TRADES dated.....
day of.....

Paragraph V: The COMPANY considers that employees in the Mechanical Maintenance, Electrical Maintenance, Die Repair and Die and Machine Shop Departments shall not be subject to the provision restricting them from job rights outside their respective Lines of Training Progression until they shall have accumulated ten (10) years experience in their respective Line of Progression, or its equivalent experience.

PERSONAL TIME

The COMPANY'S position regarding the use of personal time by employees for drinking coffee or eating lunch, fruit, etc., is as follows:

In general, such activities are restricted other than at scheduled lunch periods, however, employees may have coffee, lunch, fruit, etc., when a machine or equipment is down and/or unavoidable delay has occurred, and if it does not interfere with their assigned work. Large groups or gatherings of employees participating in the above mentioned activities will be construed to mean a violation of the understanding with the UNION and will be dealt with on an individual basis.

Your very truly,
REYNOLDS METALS COMPANY
C. C. Hudgins
Plant Manager

TRIAL EXHIBIT C
Revised Plant Rules Effective March 15, 1957
REYNOLDS METALS COMPANY
Grand Rapids Plant

PLANT RULES

Relatively few employees are discharged "for cause". So as to further reduce the number discharged we are listing some of the commonly recognized reasons, feeling that most people want to play the game fairly and will abide by the rules. These rules and penalties are established to protect both the Company and the Employees. Depending upon the seriousness of the offense and other factors in the judgment of Management, the Company reserves the option of imposing a lesser penalty than that indicated.

FIRST OFFENSE--Warning.
SECOND OFFENSE--Warning.
THIRD OFFENSE--Discharge.
Assignment of wages or receipt of garnishments. (36)
FIRST OFFENSE--Warning.
SECOND OFFENSE--1 Week Layoff.
THIRD OFFENSE--Discharge.

Horseplay, scuffling, running or throwing things at any time on Company property. (4)

Wasting time or loitering on Company property during working hours. (5)

Gambling, lottery, or other games of chance on Company premises at any time. (6)

Misuse or abuse of property of employees or the Company. (10)

Failure to notify the Company in advance when expect to be absent, except in an emergency; absence from work without reasonable cause. (11)

Excessive absenteeism, and/or tardiness. (13)

Reporting late for work without reasonable cause. (14)

Making scrap unnecessarily, careless workmanship, or not following directions of supervision. (20)

FIRST OFFENSE--1 Week Layoff to Discharge.
SECOND OFFENSE--Discharge.
THIRD OFFENSE--

Immoral conduct or indecency. (22)

The making or publishing of false, vicious, or malicious statements concerning any employee, supervisor, the Company or its products. (23)

* * * *

FIRST OFFENSE--Discharge.
SECOND OFFENSE--
THIRD OFFENSE--

Falsification of any record. (1)

Fighting on Company property at any time. (2)

Misuse or removal from the premises without proper authorization Company lists, blueprints, records or confidential information of any nature. (3)

Ringing the clock card of another employee. (7)

Restricting output or encouraging restriction of output. (8).

Deliberate abuse, misuse, or deliberate destruction of Company property, tools, equipment or the property of employees in any manner. (9)

Throwing refuse or objects on floors, out windows or doors, on Company property at any time. (21)

Creating or contributing to unsanitary conditions. (30)

Violation of safety rules and practices. (31)

Posting or removal of notices, signs or writing in any form on bulletin boards or other Company property at any time without specific authority of Management. (32)

Distribution of any written or printed literature on Company premises without written authorization. (33)

Unauthorized operation of machines, tools or equipment. (34)

Soliciting or collecting of contributions for any purpose whatsoever on Company property without written authorization. (35)

* * *

FIRST OFFENSE--1 Week Layoff.
SECOND OFFENSE--Discharge.
THIRD OFFENSE--

Voluntary absence by design or intention. (12)

* * * *

FIRST OFFENSE--Warning to Discharge.
SECOND OFFENSE--Discharge.
THIRD OFFENSE--

Reporting for work under the influence of alcohol, when suffering from an alcoholic hangover, or in an unsafe condition. (18)

Refusal to obey orders of Foreman or other supervision. (15)

Refusal or failure to do job assignment. (Do the work assigned and follow instructions; any complaint may be taken up through regular channels). (16)

Possession of, or drinking of, liquor or any alcoholic beverage either on or off Company premises during shift. (17)

Threatening, intimidating, coercing, or interfering with employees or with supervision at any time. (24)

Abusive language to any employee or supervisor. (25)

Sleeping on duty. (26)

Sabotage. (27)

Taking of photographs on Company premises without permission. (28)

Using another's badge or pass, or permitting another to use your badge or pass to enter or leave Company property at any time. (29)

Imprisonment resulting in absence of 5 days or more. (37)

Harboring a disease or condition which may endanger health of others. (38)

Possession of weapons on Company premises at any time. (39)

Entering or leaving Company property at other than authorized entrances and exits, or at other than authorized times. (40)

Theft, or misappropriation of property of employees or of the Company. (41)

Reynolds Metals Company
Grand Rapids Plant
Revised Plant Rules Eff. 3/15/57

TRIAL EXHIBIT D
WARNING NOTICE

Date: Aug. 29, 1966

Name: Robert Dewey Clock No. 22521 Dept. 1200

Warning For:

- ☐ Carelessness
- ☐ Chronic Absence
- ☐ Chronic Lateness
- ☒ Absence without Excuse
- ☐ Quitting Early
- ☐ Loafing on Job
- ☐ Smoking in Prohibited Areas
- ☐ Dishonesty
- ☐ Insubordination
- ☐ Failure to Do Work Ordered
- ☐ Under Influence of Alcohol
- ☐ Damaging Co. Property
- ☐ Gambling on Premises
- ☐ Defective Work
- ☐ Leaving Workplace without Permission
- ☐ Horseplay
- ☐ Poor Housekeeping
- ☐ Failure to Obey Safety Rules
- ☐ General Conduct (Explain Below)
- ☐ Other (Explain Below)

This is First ☒ Second ☐ Third ☐ Final ☐ warning for this offense. Next offense will result in Layoff ☐ Termition ☐.

Remarks: Violation of plant rule No. 11, Absent August 28, 1965.

Signed: William G. Clifton
Union Representative
Signed: Ray E. Coll
Company Representative.

TRIAL EXHIBIT E

WARNING NOTICE

Date: Sept. 6, 1966

Name: Robert Dewey Clock No. 22521 Dept. 1200

Warning For:

- ☐ Carelessness
- ☒ Chronic Absence
- ☐ Chronic Lateness
- ☒ Absence without Excuse
- ☐ Quitting Early
- ☒ Loafing on Job
- ☐ Smoking in Prohibited Areas
- ☐ Dishonesty
- ☐ Insubordination
- ☐ Failure to Do Work Ordered
- ☐ Under Influence of Alcohol
- ☐ Damaging Co. Property
- ☐ Gambling on Premises
- ☐ Defective Work
- ☐ Leaving Workplace without Permission
- ☐ Horseplay
- ☐ Poor Housekeeping
- ☐ Failure to Obey Safety Rules
- ☐ General Conduct (Explain Below)
- ☐ Other (Explain Below)

This is First ☐ Second ☒ Third ☐ Final ☐ warning for this offense. Next offense will result in Layoff ☐ Termition ☒.

Remarks: Violation of plant rule No. 11, Absent September 4, 1966. The above employee is hereby on disciplinary layoff effected September 12-13-14, 1966.

Signed: William G. Clifton
Union Representative

Signed: G. H. Johnson
Company Representative

TRIAL EXHIBIT F

GRIEVANCE REPORT

Grievance No. 621

Department No. 1200. Date: Sept. 7, 1966.
Shift: 3-11

Nature of Grievance
Unfair Labor Practice.

On Sept. 6, 1966 Robert Dewey was given a Labor Complaint and a three day suspension for failing to report for work on Sunday Sept. 4, 1966. Plant Rule #11 absence without a reasonable excuse. The Co. is using this rule as a club in order to force the people who rightiously believe that it is against their religious & moral principles to work on Sunday. The Co. contends that this is a normal scheduled work day if so why the Special Punishment?

A man can conceivably be absent from work on any of the other six work days five or six times with no punishment what-so-ever but if one Sunday is missed he then becomes a special case and is written up at once. This is no more than discrimination against these men and the Co. can be cited under the Federal Law for Discrimination.

For these reasons we demand that the Co. withdraw all Labor Complaints against the men of Local 277 for not working on Sundays.

Mr. Dewey should not have had a Labor Complaint on the above date as the Co. did get a replacement for him in the person of Jake Zaagman who worked of his own free will even tho it was out of his classification and out of his dept.

Signed: Robert Dewey
William G. Clifton
Steward

Foreman's Comments
General Foreman's Comments 9-8-66

Mr. Dewey was scheduled to work Sunday under the provisions of the contract. He refused to find or accept a replacement. When Mr. Dewey failed to report into work Sunday, Mr. Zaagman was ask to work an additional shift due to Mr. Dewey's absence.

Signed: G. J. Johnson
General Foreman

3rd Step--9-13-66

R. Dewey refused to work as scheduled under the contract. He had previously been warned that his excuse was not acceptable. He also refused to make use of relief provided by agreement for obtaining a replacement to perform required overtime work. Grievance denied.

R. A. Lies

TRIAL EXHIBIT G

Name: Robert Dewey Clock No. 22521 Sept. 12, 1966
Die Repair

WARNING FOR

- ☐ Carelessness
- ☐ Chronic Absence
- ☐ Chronic Lateness
- ☒ Absence without Excuse
- ☐ Quitting Early
- ☐ Loafing on Job
- ☐ Smoking in Prohibited Area
- ☐ Dishonesty
- ☐ Insubordination
- ☐ Failure to Do Work Ordered
- ☐ Under Influence of Alcohol
- ☐ Damaging Co. Property
- ☐ Gambling on Premises
- ☐ Defective Work
- ☐ Leaving Workplace without Permission
- ☐ Horseplay
- ☐ Poor Housekeeping
- ☐ Failure to Obey Safety Rules
- ☐ General Conduct (Explain Below)
- ☐ Other (Explain Below)

This is First ☐ Second ☐ Third ☒ Final ☐ warning for this offense. Next offense will result in Layoff ☐ Termination ☐.

Remarks: Violation of Plant Rule No. 11—Absent Sept. 11, 1966. Discharged. A five day suspension period is specified in the contract for filing of any protest.

Signed: William G. Clifton
Union Representative
Signed Gerald H. Johnson
Company Representative

TRIAL EXHIBIT H
PROTEST REPORT
REYNOLDS METAL CO.

Grievance Number 629,
9-26-66

Nature of Grievance--

I, Robert Dewey protest the notice of suspension given to me for failing to report for work on Sunday Sept. 11, 1966 based on plant rule #11. We contend the Company is using their rule in order to force people to work on Sunday against their religious and moral principles. The Company contends this is on a normal work day, if so why the special punishment. A man can miss any one of the other 6 days in the week without receiving any punishment what so ever but not one Sunday is allowed without it becoming a special case. We feel this is a clear case of discrimination on the part of the Company. For these reasons we request the Company to withdraw the labor complaint (notice of suspension) given me for not working on Sept. 11, 1966 and restore my seniority rights.

Received Sept. 19, 1966, Personnel Dept.

Signed: Robert Dewey
Sam Sella

TRIAL EXHIBIT I

Grievances No. 621, 622 and 629
Received Jun 30 1967 Personnel Dept.

Mark L. Kahn
Arbitrator

OPINION AND AWARD
dated
June 29, 1967

ARBITRATION
between
Reynolds Metals Company
Grand Rapids, Michigan
— and —
Local No. 277
United Automobile Workers
AFL-CIO
Hearing held April 27, 1967
Grand Rapids, Michigan

For the Union
Appearances:
Jacob Webber, Int'l Repres.
Sam J. Sella, Jr., Chairman, Bargaining Committee

Witnesses:
Robert Dewey, Grievant
Hilbert Scholten, Grievant

Present:
Carlton Galor, President Local No. 277
Gerald Berghorst, Committee
William Boyer, Committee
William Groogers, Committee
Arthur J. Verburg, Pastor, Christian Reformed Church
Jamestown, Michigan

For the Company
Appearances:
William A. Coughlin, Jr., Attorney

Witness:
Robert Lies, Personnel Manager

Present:
Robert E. Jordan, Staff Asst., Labor Relations, Richmond, Va.
John Norman, General Foreman, Extrusions
Ray Call, Foreman

OPINION

This arbitration is between Reynolds Metals Company, Grand Rapids, Michigan, and Local No. 277 of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America. It takes place under and in accordance with the Agreement between the parties entered into on September 20, 1965, and involves three grievances:

No. 621, dated September 7, 1966, filed by Robert Dewey
No. 622, dated September 7, 1966, filed by Hilbert Scholten
No. 629, dated September 26, 1966, filed by Robert Dewey.

The issue relates to the refusal of Dewey and Scholten to perform any Sunday work, for which each man was given a three-day suspension and for which Dewey was discharged on September 12, 1966.

The parties, after failing to dispose of these three grievances in the prior steps of their Grievance Procedure, picked the undersigned to serve as

impartial arbitrator for these grievances from a panel supplied by the Federal Mediation and Conciliation Service. Notice of this appointment was sent to the undersigned on March 23, 1967.

A hearing was held in Grand Rapids on April 27, 1967. Each party had a full opportunity, during this hearing, to present evidence and argument. Subsequently, in accordance with arrangements established at the hearing, each party was accorded an opportunity to file a post-hearing brief. The record was closed as of June 12, 1967, upon the receipt of a brief from the Company. No brief was filed by the Union.

Background

The Company's plant in Grand Rapids produces aluminum billets and extrusions. Prior to and during most of 1963, the plant operated on a five-day schedule with some employees on layoff. Demand then increased, the Company started to recall laid off employees in late 1963, and during most of 1964 and 1965 the Company operated "five-plus" days per week with no employees laid off. Since late 1965, in response to still heavier demand for its products, the Company has operated on essentially a "six-plus" weekly schedule, utilizing Saturdays regularly and also requiring substantial numbers of its employees to work on most Sundays. For example, Sunday production took place on 24 of the 37 Sundays between January 1 and September 11, 1966.

The Agreement contains the following provision in Article IX:

> Section 3. All employees shall be obligated to perform all straight time and overtime

> work required of them by the COMPANY except when an employee has a substantial and justifiable reason for not working; provided, however, that no employee shall be required to work more than twelve (12) continuous hours without his consent.

The above-quoted provision was first adopted by the parties in their agreement of March 15, 1960, and has since been retained unchanged. A proposal by the Union during the 1965 contract negotiations to eliminate this paragraph was not successful.

The Agreement also provides, in Article IX, that overtime work should be divided as equally as possible among employees in each job classification in each department; that if less than all of the qualified employees in a classification in a department are needed on other than a normal straight time work day, the number required will be scheduled in accordance with the "overtime chart"; and that (per Section 4 (d).)--

> If an employee scheduled to work such overtime notifies the COMPANY prior to 5:00 P.M. Friday that, for a substantial and justifiable reason, he would prefer not to work such overtime, the COMPANY will attempt to obtain a qualified replacement by offering, in accordance with the overtime chart, the work to other employees within that classification in that department who are qualified to perform the work but who had not been scheduled to work such overtime. If a qualified replacement is not obtained, the required number of employees shall be selected by the COMPANY from among the employees who were offered such overtime in the inverse order of their seniority.

On September 20, 1965, which is the date of the current Agreement, the Company addressed a letter to the chairman of the Union's Negotiating Committee that began as follows:

> At the request of the Committee, of which you are Chairman, we are clarifying the Company's position regarding the meanings of certain parts of the contract agreed to during recent contract negotiations.
>
> ARTICLE IX, Section 3 OVERTIME PROVISIONS
>
> The COMPANY will relieve an employee of the obligation of performing overtime work under this Section under the following conditions:
>
> (a) The employee furnishes a qualified replacement to perform the scheduled overtime.
>
> (b) Questions of qualification will be determined by the Foreman. * * *

The Company's Plant Rules, posted in each department and in effect since 1957, contain a list of 41 kinds of misconduct and a penalty schedule for each kind. No. 11 includes "absence from work without reasonable cause" and calls for a warning for the first offense, a one-week layoff for the second offense, and discharge for the third offense. The Plant Rules also state: "Depending upon the seriousness of the offense and other factors in the judgment of Management, the Company reserves the option of imposing a lesser penalty than that indicated."

Grievant Dewey has a seniority date of June 12, 1951, and was a Die Repairman. He refused to work

as scheduled on Sunday, November 21, 1965, on the basis of his religious beliefs, and he advised the Company at that time that he would not work on any Sundays because of those beliefs. Dewey was given a verbal warning at that time and was advised that a repetition would lead to disciplinary action under Plant Rule No. 11.

Dewey was next scheduled for Sunday work on August 7 and August 14, 1966. On each of these dates, however, he was replaced by Jake Zagman, apparently at Zagman's initiative, and Zagman was considered by the Company to be an acceptable replacement in accordance with the terms of the Letter of Interpretation dated September 20, 1965. When Dewey was scheduled to work on Sunday, August 28, 1966, however, Dewey told Zagman not to serve again as his replacement. Dewey himself refused to work on August 28 and was then given a written warning for violation of Plant Rule 11.

Dewey's next Sunday work was scheduled for September 4, 1966, and upon his refusal of this assignment (and no attempt to obtain a replacement) he was given another written warning plus a three-day disciplinary suspension. This penalty is the basis of his Grievance No. 621. Dewey was next scheduled for Sunday work on September 11, 1966, and he was discharged on the following day after refusing the assignment (and again making no effort to obtain a replacement). This discharge is the basis of his Grievance No. 629.

Grievant Scholten has a seniority date of October 24, 1950, and is a Shape Truing Machine Operator. He refused to work on Sunday, January 16, 1966, because of his religious beliefs. The Company then advised Scholten that this particular absence

would not be held against him but that this reason for any future refusal of Sunday work would not be acceptable. Scholten was next assigned to Sunday work on April 17, 1966. He again refused for religious reasons and stated that he would not work on any Sunday. He was given a written warning. Scholten nevertheless refused his next Sunday work assignment on August 14, 1966, and was then given another written warning plus a three-day disciplinary suspension. Scholten then filed Grievance No. 622.

We are confronted with the identical issue in the cases of Dewey and Scholten. Both grievants have firmly refused all Sunday work on the grounds that such work is not permitted by their religious beliefs. Both grievants have also refused to utilize the opportunity provided under the Letter of Interpretation dated September 20, 1965, to furnish (or attempt to furnish) a qualified substitute. Scholten has never accepted Sunday work at the Company. Dewey acknowledges having done some Sunday work for the Company many years ago, before his religious beliefs took their present form in or about 1961. The principal distinction between the status of the two grievants is that Scholten (as of April 27, 1967) had not been again assigned to Sunday work since his three-day penalty in August 1966. The Company does not question the sincerity of the grievants' religious convictions under which Sunday work at the Company is prescribed.

Position of the Company

The Company maintains that the religious beliefs of the grievants do not provide "a substantial and justifiable reason" for their refusal of all Sunday work. The Company emphasizes that the grievants are members of a bargaining unit covered by

a collective bargaining agreement under which all properly scheduled work assignments are compulsory; that the Company has had to assign a good deal of Sunday work since late 1965 in order to meet contractual commitments involving both government and civilian product needs; that the Union's 1965 attempt to eliminate compulsory overtime did not succeed; and that the Company has consistently refused to excuse employees from Sunday work on religious grounds.

The Company notes that on January 16, 1966, it terminated two supervisors who refused to work on Sundays, and it cites four written warnings (Dekker, Hatfield, Walthorn, Carlton), three three-day layoffs (van Haitsma, Zylstra and Wyn), and one discharge (Knight), all given in and since 1966 in accordance with the penalty schedule for violations of Rule 11, Knight's grievance protesting his discharge because of his absence from work on Sunday, August 28, 1966, was withdrawn by the grievant and the Union. The Company also cites a decision by Arbitrator Ronald W. Haughton dated June 3, 1965 (Grievance No. 439), upholding a warning notice issued to employee Zylstra because of his absence from Sunday work for religious reasons on July 26, 1966.

The Company submits that the establishment of a replacement system in September 1965 attests to the reasonableness of the Company's application of the compulsory overtime clause. The Company observes that--

> the refusal of the grievants to allow the replacement system to operate reduces the position of the grievants in this situation to one of narrow personal consideration which

cannot be condoned since the grievants are part of the work force and are subject to the terms and conditions of the Labor Agreement ...

[Company Brief, p. 12]

The Company reports that both of the instant causes have also been the subject of investigations by the U.S. Office of Federal Contract Compliance and by the Michigan Civil Rights Commission and that the conclusion of each agency is that there was no violation of the respective laws. The Company asserts that to excuse the grievants from Sunday work on religious grounds would in fact discriminate against other employees. It is the Company's conclusion, based on all of the foregoing considerations, that the grievances of Dewey and Scholten should be denied.

Position of the Union

The Union contends that there clearly exists "a substantial and justifiable reason" for excusing the grievants from Sunday work in accordance with the exception specified in Section 3 of Article IX, namely, their religious beliefs which do not permit them to work on their Sabbath day. The Union asserts that other employees have been excused from scheduled work for less substantial and less justifiable reasons, such as their desire to attend baseball games, picnics and wedding anniversaries. In fact, says the Union, it is not aware of any instances where Rule 11 has been applied except to instances involving the religious beliefs of employees.

The Union points out that on many of the Sundays for which the grievants were given a warning or penalty for refusing to work, replacements were in fact available. The Union suggests that if the Company

had wanted to work out the problem it could and should have cooperated with the Union in obtaining replacements for the grievants instead of penalizing these men for their religious beliefs.

As to the arbitration decision of Arbitrator Haughton cited by the Company, the Union points out that Mr. Haughton relied on the fact that the aggrieved employee in that case "found it possible to make adjustments and to accept Sunday overtime assignments from time to time in the past." In this case, however, Scholten has never accepted a Sunday assignment and Dewey has not worked on Sundays since his religious beliefs took their present form in 1961.

The Union suggests that the effect of the Company's interpretation and application of Article IX, Section 3, in light of the Letter of Interpretation dated September 20, 1965, is to discriminate against those employees who seek to be excused from assigned work for reasons of religion. The Union concludes that these grievances should be sustained, the penalties removed, and the grievants made whole for earnings lost because of the improper penalties imposed on them.

Discussion

Section 3 of Article IX, which had been in effect about six and one-half years when the grievances involved in this case were filed, makes overtime work compulsory when it is assigned in accordance with other provisions in Article IX unless the employee who has been assigned to the overtime work can furnish a qualified replacement. I must decide whether or not the religious beliefs of the grievants provide them with an entitlement to refuse all Sunday

work under the "substantial and justifiable" criteria of Article IX, Section 3. A corollary issue raised by their conduct is whether or not they were also entitled to refuse to attempt to obtain a qualified replacement.

My first conclusion is that the grievants were not entitled to rely upon the "substantial and justifiable reason" exception as a basis for refusing all Sunday work. The Company resorts to Sunday work assignments, for which it must pay employees at double-time rates, only when heavy customer demands appear to leave no practical alternative. The procedures for assigning such work maximize the opportunity for individual employees who prefer not to work on Sunday to avoid such work by first relying on volunteers. When these are not sufficient, the junior qualified employees (in the classification within the department) are then involuntarily assigned, but even these "draftees" are entitled to furnish qualified replacements (who need not be from within the same department). Consequently, when we look at the situation with some perspective, it is seen that an individual employee will have to work on a Sunday against his will only as an exceptional event. In my judgment, employees may not flatly refuse to work on these "exceptional" Sundays in view of their obligations under the Agreement and the Company's consistent administration of the relevant provisions.

It is worth noting, perhaps, that Article IX, Section 3, applies explicitly to "all straight time and overtime work" and not merely to overtime work. Suppose that an employee decided to join a religious organization with a Wednesday Sabbath, and that he thereafter refused to work on Wednesdays. It would be obvious, I think, that the Company could properly find this employee in violation of Rule 11;

yet, the language of the Agreement makes no distinction for this purpose between straight time and overtime work assignments.

My second conclusion is that both grievants had an obligation, under all the circumstances, to utilize the established replacement procedure in order to minimize or perhaps avoid entirely the need to confront the Company with a refusal of Sunday work. I do not question the sincerity of their conviction that it would be sinful for them to look for a replacement, but I consider it to be misconduct under the Agreement for them to have refused to do so. (Dewey, it will be recalled, accelerated his disciplinary timetable by telling Zagman not to serve as a replacement any more.)

Arbitrator Haughton, in his 1965 decision in the Zylstra case (cited earlier), appeared to rely only partly on the fact that Zylstra "has found it possible to . . . accept Sunday overtime assignments in the past." Haughton then wrote:

> . . . . In these circumstances, and recognizing that it is an established practice for Sunday overtime work to be required when necessary in modern industry, the decision on the basic question of whether or not the aggrieved, because of a religious conviction, had substantial and justifiable reason for not working must be in the negative.

On reviewing the facts of the grievances now before me, I would conclude that the question of whether or not an employee happened to accept Sunday work in the past (which Dewey did) or has always refused Sunday work (like Scholten) is not determinative of

the basic issue.[1] Of more relevance as precedent, I think, is the fact that a grievance protesting the discharge of Knight in August 1966 for refusing Sunday work on religious grounds was later withdrawn.

An important commitment arising out of one's religious convictions and obligations can provide a "substantial and justifiable reason" for excusing an employee from some particular work assignment, on a Sunday or on some other day. What I found here, however, is that the Agreement does not permit a regular and continuing refusal of all Sunday work on religious grounds. I will therefore not sustain the grievances.

AWARD

Grievances No. 621 and No. 629 (Robert Dewey) and Grievance No. 622 (Hilbert Scholten) are hereby denied.

Mark L. Kahn
Arbitrator

DATED: June 29, 1967

[1] Dewey's religious views did not take their present form, under which he feels compelled to refuse all Sunday work, until about 1961. This was after the adoption of the present compulsory overtime provision, which occurred in March 1960.

TRIAL EXHIBIT J
STATE OF MICHIGAN
GEORGE ROMNEY, Governor
CIVIL RIGHTS COMMISSION
900 Cadillac Square Building, Detroit, Michigan 48226
Telephone: 222-1810
BURTON I. GORDIN, Executive Director

September 19, 1966

Re: #1904-E4 Robert K. Dewey
-vs- Reynolds Metals Company

Mr. R. A. Lies
Personnel Manager
Reynolds Metals Company
1701 Porter, S.W.
Grand Rapids, Michigan

Dear Mr. Lies:

This is to advise you that Mr. Robert K. Dewey has filed an application for the issuance of a complaint by this Commission against Reynolds Metals Company.

Mr. Dewey states that on September 12, 1966, he was notified that his employment was being terminated as of that date for violation of Plant Rule No. 11, Absence Without Excuse. Mr. Dewey states that he had received three Warning Notices for allegedly unexcused absences on August 28, September 4, and September 11, 1966, although he had notified the company of his preference to not work on Sundays because of his religious beliefs. Mr. Dewey states that a Letter of Agreement has been developed between the Union and the company which provides that the company will find replacements or substitutes for employees who prefer not to work

overtime. Mr. Dewey states that substitutes were secured to perform his work on both Sunday, September 4, and Sunday, September 11.

Mr. Dewey believes he has been subjected to discriminatory treatment and discharged because of his religious beliefs.

This case has been assigned to Representative Delbert W. Hunt for investigation. Mr. Hunt will contact you in the near future to make an appointment to discuss this matter with you and/or your representative.

We find in many cases, however, that claims can be settled prior to investigation. If you have any suggestions of ways of settling the claim described herein prior to such investigation, we would most appreciate having you contact Mr. Hunt. Such suggestions, of course, in no way imply that the claim has merit. We solicit these suggestions because of your knowledge of the situation and because of the possibility that a solution can be proposed which will save time for all concerned.

Very truly yours,

Thomas J. Peloso, Jr.
Director of Compliance

TRIAL EXHIBIT K
STATE OF MICHIGAN
CIVIL RIGHTS COMMISSION
900 Cadillac Square Building
Detroit, Michigan 48226
NOTICE OF DISPOSITION
Application No. 1904--EM
CLAIMANT: Robert K. Dewey
RESPONDENT: Reynolds Metals Company

SUMMARY OF FINDINGS:

The findings indicate that the claimant, despite due notice of overtime requirements by the company and the applicable Collective Bargaining Agreement provisions, continued to refuse to perform scheduled overtime work on Sundays and took the position that his right to continued employment while following his religious belief without interference was an absolute right.

The Commission has previously ruled that where the normal work week and forseeable overtime requirements are prescribed in a Collective Bargaining Agreement, that absent or (sic) intent on the part of respondent to discriminate on religious grounds, an employee is not entitled to demand any alteration in such requirement to accommodate his religious beliefs.

The investigation did not reveal any intent on the part of the respondent to discriminate on religious grounds and it is, therefore, recommended that this application for the issuance of a complaint be denied for lack of probable cause.

ORDER OF DISMISSAL

The Commission has found insufficient grounds on which to issue a Complaint and, therefore, the above Application is herewith denied. This Order of Dismissal shall automatically become effective within 15 days from the date of mailing unless the Claimant shall demand a hearing prior thereto.

BY ORDER OF THE CIVIL RIGHTS COMMISSION

By: /s/ Burton I. Gordin
Executive Director

Date: December 13, 1966

MICHIGAN CIVIL RIGHTS COMMISSION, RULES GOVERNING ORGANIZATION, PRACTICE AND PROCEDURE

RULE 7 "Any Claimant may request of the Commission a reconsideration of its refusal to issue a Complaint or any Party may request as to the terms of conciliation. Such request must be in writing, state specifically the grounds upon which it is based, and be filed within 15 days from the date of mailing of the notice of disposition of which reconsideration is requested. It shall be filed in the office of the Commission (personally or by mailing) where the application was previously filed.

"The Commission in its discretion shall grant or deny the request for reconsideration. In either event, it may schedule a hearing thereon at such time and place and before such Hearing Commissioner or Commissioners or Hearing Referee or Referees

as it may determine, and notice thereof shall be given to all Parties to the proceeding . . .".

RULE 10 (a) "Any Party or intervenor claiming to be aggrieved by a final order of the Commission, including without limitation a refusal to issue a Complaint, may appeal to the Circuit Court of the State of Michigan having jurisdiction provided by law . . .".

Dated at Detroit, Michigan and Mailed on December 14, 1966.

TRIAL EXHIBIT L
CHARGE OF DISCRIMINATION
(Under Title VII of the Civil Rights Act of 1964)

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. G1-7-1-295

Mail to Equal Employment Opportunity Commission, 1800 G Street, N.W., Washington, D.C. 20506.

ROBERT DEWEY, 901 32nd S. W., Grand Rapids Michigan 49509.

Was the discrimination because of: Religious creed.

Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Reynolds Metal Company, 1701 Porter S.W., Grand Rapids, Michigan 49509.

Have you filed this charge with a state or local government agency? Yes.

If your charge is against a company or a union, how many employees or members? Approx. 300.

The most recent date on which this discrimination took place: September 12, 1966.

Explain what unfair thing was done to you:

Employee has been an employee of Reynolds Metal Company for fifteen years. Approximately one year ago the company signed with the union representing the employee, an agreement in which the company was permitted to require overtime. The provisions of the contract read as follows:

> "All employees shall be obligated to perform all straight time and overtime work required of them by the COMPANY except when the employee has a substantial and justifiable reason for not working."
>
> Article IX, Sec. 3, of the Agreement between Reynolds Metal Co. and the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America UAW-AFL-CIO and Local 277.

Subsequent to signing this agreement, the company decided to require overtime on Saturday and Sunday, the.....

NOTE: See other side for beginning of explanation.

I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date: December 30, 1966.

Robert Dewey

Subscribed and sworn to before me this 30th day of December, 1966.

Gertrude Bos, Notary Public

Employee is a member of the Reformed Church of America, and has been converted to Christ for five years. Every Sunday he teaches Sunday School in his church. He believes that Sunday is a day to worship and serve God, and these beliefs compel him to abstain from work on Sunday.

Employee has been an employee of Reynolds Metal Company for fifteen years. Approximately one year ago the company signed with the union representing the employee, an agreement in which the company was permitted to require overtime. The provisions of the contract read as follows:

> "All employees shall be obligated to perform all straight time and overtime work required of them by the COMPANY except when the employee has a substantial and justifiable reason for not working."

Article IX, Sec. 3, of the Agreement between Reynolds Metal Co. and the International Union, United Automobile, Aerospace, and Agricultural Implement Workers of America UAW-AFL-CIO and Local 277.

Subsequent to signing this agreement, the company decided to require overtime on Saturday and Sunday. The weeks in which overtime on Sunday was required were not permanent but were required from time to time as the company required. During the first of these weeks, employee was on vacation. At this time, a few other employees were absent on Sunday because of religious beliefs.

The company found such a reason unacceptable in spite of the fact that the company gave a fellow worker an excused absence when the reason given was to attend a family reunion. The company also gives excused absences for health, attendance of a funeral, and other reasons.

After this first incident, the company initially declined to enforce their position, but later took the position that the employee would be absent without excuse if the employee did not obtain a substitute on his own.

Because of his religious beliefs, employee did not work on Sundays August 28, 1966, September 4, 1966 and September 11, 1966. On all these days employee did not obtain a substitute worker on his own, although employee knows that on at least one of these dates there was a substitute. On all of these dates, employee notified the company prior to the particular Sunday that he would not work on that Sunday. Because of his failure to appear at work on September 11, 1966, employee was discharged September 12, 1966.

Since the time of the discharge, employee has filed a claim, number 1904-EM with the Michigan Civil Rights Commission on September 16, 1966. The claim was decided December 13, 1966, against employee.

Employee asks the Equal Employment Opportunity Commission to find that Reynolds Metal Company discriminated against employee because of his religion because:

(1) When employee was originally hired by Reynolds Metal Company, there was no requirement forcing him to work. After employee had accumulated fifteen years seniority and the occupational benefits which accompany this seniority, employee was dismissed because of a requirement, the effect of which was to force those persons who had bona fide religious beliefs, either to violate those beliefs and work for the company or to remain steadfast to those beliefs and be dismissed. Employee believes that the policy of the statute was to protect himself and his beliefs from the pressure of his employer. If the employer can force the employee to violate his religious beliefs through company requirements which on the face of the requirements seem to affect all, yet in effect, forces those with bona fide religious beliefs to suffer hardships, the purpose of the act is defeated.

(2) The number of employees who refuse to work on Sunday because of bona fide religious beliefs are very small in comparison to the total working force, and would represent an insignificant amount of inconvenience to the company in order to permit employee to practice his religious beliefs.

(3) The company allows excused absences for health, family reunions, and other reasons. Employee maintains first, that observing his spiritual convictions to God is a substantially better reason for an excused absence than a family reunion. Secondly, employee maintains that spiritual health

is just as important as physical health and that the difficulty in policing excused absences for religion is not any greater than policing bona fide sick days.

TRIAL EXHIBIT M
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20506

January 5, 1968

In Reply Refer To:
Case No. CL 7-1-15
Reynolds Metals Company
Grand Rapids, Michigan

Mr. Robert A. Lies
Personnel Manager
Reynolds Metals Company
1701 Porter Street, S.W.
Grand Rapids, Michigan

Dear Mr. Lies:

After investigation of charges, the Equal Employment Opportunity Commission has determined there is reasonable cause to believe that the above named Respondent has engaged in unlawful employment practices under Title VII of the Civil Rights Act of 1964. A copy of the Commission Decision is enclosed.

As soon as possible a conciliator will contact the parties to discuss means of correcting the discrimination involved and ways of avoiding it in the future. The conciliator will propose a written conciliation agreement for this purpose. If an agreement is signed by the parties, it will be submitted to the Commission for its approval. If the Commission is unsuccessful in its efforts to secure

voluntary compliance, it must so notify the Charging Party and advise him of his right to seek relief in a Federal Court.

Under the Statute and the Regulations of the Commission, nothing said or done during or as a result of conciliation may be made public by the Commission or used as evidence in a subsequent proceeding without the written consent of the parties.

We are hopeful that you will cooperate with us in achieving the objectives of the Civil Rights Act and that we will be able to resolve the matter quickly and satisfactorily to all concerned.

Sincerely yours,

Robert L. Randolph (Acting)
Director of Compliance

Received: January 10, 1968
Personnel Dept.

OPINION
(Filed June 6, 1969)

This is an action arising under Title VII of the Civil Rights Act of 1964, 42 USC §2000 (e), which provides, among other things, for relief against religious discrimination in employment. The parties have stipulated to the facts, the most pertinent of which are set forth below.

Plaintiff, Robert Dewey, was employed by defendant at its Wyoming, Michigan plant on June 14, 1951, and held various jobs until he became a die repairman, which is the job he held at the time of his discharge on September 12, 1966.

Defendant's Wyoming facility is a "job type" plant which produces aluminum extrusions and billets on an order basis. Before 1964 the plant operated on a five-day weekly schedule. Because of increased business, during 1964 and 1965 the plant operated on a "five plus" days weekly schedule. This increased to "six plus" days by 1966, with numerous Sunday work schedules.

Plaintiff was a member in good standing of the U.A.W. Union, Local 277, which represents the production and maintenance employees of defendant's plant.

Before the 1960 Labor Agreement, overtime at the plant was performed on a voluntary basis, and under such circumstances scheduling of production was made impossible on certain overtime days. In 1960, and to the present time, the agreements have included a section giving defendant the right to set overtime schedules and make it compulsory for the employees to work such schedules unless they have a sbustantial and justifiable reason for not doing so. This section in the 1965 Labor Agreement is Article IX, Section 3:

> "All employees shall be obligated to perform all straight time and overtime work required of them by the COMPANY except when an employee has a substantial and justifiable reason for not working; provided, however, that no employee shall be required to work more than twelve (12) continuous hours without his consent."

The agreement also provides, in Article IX, Section 4, that overtime work shall be divided as equally as possible. If fewer than all qualified employees

are needed, the number required is to be scheduled with the overtime chart, and if more employees are needed, they are assigned in the inverse order of their seniority.

In response to a Union objection to the compulsory overtime clause, defendant on September 20, 1965, issued an interpretation of the Labor Agreement which said in effect that any employee assigned to overtime could be relieved from that assignment by arranging for another qualified employee to replace him. This system has been utilized extensively.

Since December of 1961, plaintiff has been a member of the Faith Reformed Church, affiliated with the Reformed Church of America. After joining this church plaintiff never volunteered for Sunday overtime work, although he did volunteer for other days.

Plaintiff was scheduled to work overtime on Sunday, November 21, 1965, pursuant to the compulsory overtime provisions of the Labor Agreement. He refused to work because of his religious beliefs; he was given a verbal warning; and he was advised of the necessity of a seven-day operation and that a repetition of his conduct would lead to a disciplinary action under Plant Rule 11. This rule prohibits "absence from work without reasonable cause," and provides a three-offense progression of punishment, with discharge for the third offense.

On the next five Sundays which plaintiff was required to work, between January and August 1966, he instead obtained qualified replacements in the manner described, supra. But on August 28, 1966, when again required to work on Sunday, plaintiff

refused to work because of his religious beliefs and refused because of his religious beliefs to obtain a replacement. He told Jake Zagman, a fellow employee who had been serving as his replacement, that he would no longer ask Jake to replace him. Plaintiff was given a written warning of violation of Plant Rule 11.

There is no dispute that these religious beliefs of plaintiff are sincere. These beliefs were expressed by plaintiff to the defendant before the first time he refused to obtain a qualified replacement. Plaintiff honestly believes, as a part of his religion, that he should not work on Sunday, and that he also should not induce anyone else to work on Sunday.

Consequently, on the next Sunday which plaintiff was required to work, September 4, 1966, he refused to work or to obtain a replacement. He was given a written warning and a disciplinary layoff of three days. Plaintiff again refused to work on Sunday, September 11, 1966, and was discharged for violation of Plant Rule 11.

On all the above-mentioned Sundays there were several qualified die repairmen available to work, although defendant states that two of these men could not be compelled to accept such an overtime assignment, since it was outside their job classification.

Before plaintiff's discharge, defendant had taken disciplinary action as to a number of other employees who refused overtime work assignments on Sunday because of their religious beliefs, as well as disciplinary action against employees who refused overtime on days other than Sunday.

Plaintiff filed a grievance upon his discharge, but his grievance was denied at every step of the procedure, including arbitration. The arbitrator considered only the contract, and neither the Civil Rights Act nor the Constitution was before him. Plaintiff then proceeded to the Michigan Civil Rights Commission, which denied his complaint due to insufficient grounds. Plaintiff then filed a charge with the Equal Employment Opportunity Commission, which issued a letter to defendant stating that the Commission had determined that there was reasonable cause to believe that defendant had engaged in unlawful employment practices under Title VII of the Civil Rights Act of 1964.

This action was brought upon failure of conciliation efforts. In November of 1968, this court denied defendant's motion to dismiss, 291 F. Supp. 786.

These are the facts that have been established. Before stating the law and applying it to these facts, it is well to note the facts which have not been brought before the court. There is no evidence that defendant would suffer any hardship should plaintiff prevail in this case. There is no evidence concerning what the effects would be of an accommodation by defendant to the religious beliefs of plaintiff. Could defendant continue to operate on Sunday? Would production be affected? These questions, and others like them, remain unanswered even though the parties have been given ample opportunity to present evidence concerning facts which were not possible to stipulate.

Because an application of Title VII of the Civil Rights Act of 1964, 42 USC §2000 (e) will permit the court to decide the case, it is not necessary to

reach the question of whether plaintiff's constitutional rights have been violated.

Section 703 (a) (1) of the Act, 42 USC §2000 (e)-2 (a) (1), provides:

> "It shall be an unlawful employment practice for an employer--
>
> (1) to . . . discharge any individual . . . because of such individual's . . . religion . . ."

The Act makes exception to this rule only in those instances where religion is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 USC §2000 (e)-2 (e). That exception has not been alleged, and clearly does not apply to the manufacture of aluminum extrusions.

To further the purposes of the Act, the Equal Employment Opportunity Commission was formed. 42 USC §2000 (e)-4. The Commission was given power not only to aid the enforcement of the Act, but also to promulgate regulations consistent with the provisions and purposes of the Act. 42 USC §2000 (e)-12 (a). Regulation Section 1605.1 is directly applicable to this case:

> "Section 1605.1 Observance of Sabbath and other religious holidays.--(a) Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to discharge or refuse to hire employees who regularly observe Friday evening and Saturday, or some other day of the week, as the Sabbath or who observe certain special religious holidays

during the year and, as a consequence, do not work on such days.

"(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703 (a) (1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business. Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of absence of the Sabbath observer.

"(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable.

"(d) The Commission will review each case on an individual basis in an effort to seek an equitable application of these guidelines to the variety of situations which arise due to the varied religious practices of the American people."

Great weight should be given to this regulation, as the Supreme Court emphasized in Udall v. Tallman, 380 U.S. 1, 16 (1965):

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Unemployment Comm'n. v. Aragon, 329 US 143, 153, 91 L ed 136, 145, 67 SCt 245. See also, e.g., Gray v. Powell, 314 US 402, 86 L ed, 301, 62 S Ct 326; Universal Battery Co. v. United States, 281 US 580, 583, 74 L ed 1051, 4054, 50 S Ct 422. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'." Power Reactor Co. v. International Union of Electrical, etc. 367 US 396, 408, 6 L ed 2d 924, 932, 81 S Ct 1529.

In considering the law to be applied, the effect of the labor-management agreement must be determined. The agreement prescribes a certain procedure for assignment of overtime and for disciplinary discharge. If the procedures provided are lawful, defendant would prevail. If they are unlawful, the fact that it is a labor-management agreement will not validate the procedures. An agreement which violates a provision of the federal constitution or of a constitutional federal statute, or which cannot be performed without violating such a provision,

is illegal and void. Ewert v. Bluejacket, 259 U.S. 129, 138 (1922); Connolly v. Union Sewer Pipe Co., 184 U.S. 540 (1902); 17 Am. Jur. 2d, Contracts §165 (1964).

The issue is thus not changed by the existence of a contract. If the procedures used are discriminatory, the plaintiff is entitled to relief, notwithstanding the fact that the contract authorized the procedures.

In applying the law to the facts in this case, we are concerned with the answer to one question: is the enforcement, by discharge, of compulsory overtime on Sunday discriminatory when, solely for religious reasons, the person discharged refuses to work on Sunday or to obtain a qualified replacement?

The defendant argues that discrimination requires a rule which applies differently to different groups, and that the compulsory overtime provision applies equally to all employees. This argument is invalid, because it is entirely possible that while a rule may apply equally to all employees, it does not have an equal impact on them. The court should look beyond the fact of the rule to determine whether it is discriminatory. See, in another context, Ranjel v. City of Lansing, 293 F. Supp. 301 (W.D. Mich. 1968).

Rules having uniform application but a discriminatory effect against an individual's religion have been struck down before. Sherbert v. Verner, 374 U.S. 398 (1963), is probably the leading case in this regard. In Sherbert the plaintiff was denied unemployment compensation benefits because she

refused to work on Saturday because of her religion, and was therefore "unavailable for work." The law applied equally to all, but its impact was discriminatory as to Seventh Day Adventists, such as the plaintiff. In rejecting an argument similar to that made by the defendant in this case that the rule applies equally to all, the Supreme Court, through Mr. Justice Brennan, stated at pp. 403 and 404:

> "In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our inquiry. For '(i)f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect.' Braunfeld v. Brown, 366 U.S. 599, 607. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forgo that practice is unmistakable." (Emphasis supplied.)

The facts of Sherbert are similar to a recent Michigan case, Swenson v. Employment Security Commission, 340 Mich. 430 (1954). Again a provision which was applied equally had a significant impact only on Seventh Day Adventists. The application of the provision was therefore struck down.

A final example of the fallacy of defendant's argument is West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624 (1943). All school children in West Virginia were required to salute the flag, a rule which on its face is not discriminatory. But saluting the flag was forbidden by the religious beliefs of some of the students. The Supreme Court declared such a rule to be unconstitutional.

In each of these cases, as in the case at bar, the uniform application of a rule or requirement was struck down because its effect, its impact, was discriminatory.

The compulsory overtime rule of defendant, coupled with the option to obtain a qualified replacement, is not discriminatory on its face, but this is only the first step. Is the rule discriminatory in its impact? To answer the question it must first be determined what "discriminatory" means. Two definitions in the religious context are suggested, one by Sherbert v. Verner, supra, and one by the Equal Employment Opportunity Commission guidelines, also discussed supra. The standards suggested by these definitions will be applied to the case at bar.

In relation to Sherbert, one might question its relevance, since in that case there was "state action," while in the instant case there is only private action. That distinction would be important if this opinion were dealing with whether defendant's overtime rule is unconstitutional. But the issue before the court is whether the defendant has violated a federal statute--a statute which restricts the activities of private employers and does not require "state action." The importance of Sherbert to this analysis is not

its holding on constitutionality, but its definition of discrimination -- a definition which is equally valid whether employed to measure private or state action.

The religious discrimination in Sherbert is succinctly defined at 374 U.S. 404:

> "The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning of one of the precepts of her religion to accept work on the other hand."

Thus, a rule which forces a person to choose between his religion and compensation benefits is penalizing him solely because of his religion.

Applied to this case, plaintiff has been forced to choose between his religion and his job. Such a choice limits plaintiff's free exercise of his religion, and is thereby discriminatory in its effect. Applying the principles of Sherbert, the rule of defendant should not be enforced against plaintiff.

It is not necessary to rest the decision entirely on the Sherbert doctrine, however. The guidelines of the Equal Employment Opportunity Commission make it very clear what duties vis-a-vis religious beliefs are imposed upon any employer. Those guidelines are a very reasonable interpretation of the statute, and are hereby adopted as defining the requirement of the statute that an employer not discriminate on the basis of religion.

The test set forth is a twofold one: (1) the employer must make reasonable accommodations to the religious needs of its employees; (2) unless such accommodation will cause undue hardship on the conduct of the employer's business.

The evidence does not establish that a reasonable accommodation to plaintiff's religious beliefs was made by defendant. When considering plaintiff's beliefs, it must be remembered that a fundamental part of them was that plaintiff could not ask anyone else to work on Sunday, because that would be as much a sin as working himself on Sunday. There is no dispute as to the sincerity of this belief.

Requiring the employee to obtain a qualified replacement may be some accommodation to those who do not approve of Sunday work, but it is no accommodation whatsoever to those who believe, as plaintiff does, that it is a sin to induce another to commit the sin of working on Sunday. As to this sincere religious belief of plaintiff, defendant has made no accommodation.

Moving to the second half of the Equal Employment Opportunity Commission test, the defendant has not demonstrated any undue hardship. As stated earlier, full opportunity was given for any and all relevant facts to be presented. Yet the only factor tending to show hardship was that ten years ago there was some difficulty scheduling production on Sunday. This is not the type of hardship envisioned by the guidelines:

> "Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualification during the period of absence of the Sabbath observer."

Dewey's case is just the opposite. There were always several available employees who could perform his work.

The other facts cited to show hardship by defendant are not part of the stipulated facts, and are not properly before the court.

Defendant alludes to the possibility that this exception would open the door to other exceptions not based on religion. This is pure speculation which is not supported by logic. Sherbert, supra, 374 U.S. at 407. Other exceptions are not authorized, indeed mandated, by federal law. There is no reason why an accommodation cannot be made relative to religious beliefs, and limited thereto.

Thus plaintiff prevails under both definitions of discrimination. The overtime procedures of defendant, as applied, violated the Civil Rights Act of 1964.

The fashioning of a remedy presents a serious problem, because a reasonable accommodation is better worked out by agreement of the parties than by fiat of the court. For this reason, the only affirmative relief which will be awarded at this time is that plaintiff be returned to work, with back pay from August 1, 1967.[1]

As to further accommodations which should be made in accordance with this opinion, the parties are asked to reach a solution acceptable to all concerned. Such a solution might include the defendant's

[1] The guidelines became effective July 10, 1967. Before the defendant was not on notice as to the meaning of the statute. But in a reasonable time after the effective date an accommodation should have been worked out. August 1, 1967 is such a time.

obtaining qualified substitutes or a shared overtime type of arrangement whereby the people who could not work Sundays would work overtime on other days of the week.

These are merely suggestions. The parties know which types of accommodations are best suited to their particular needs. It is also suggested that the union be a party to negotiations concerning an acceptable change in the contract, so that the contract will conform to the law.

The court expressly retains jurisdiction of the case, to review agreements reached by the parties pursuant to this opinion, or to issue whatever orders are necessary to insure that the religion of defendant's employees is properly respected and fairly accommodated.

IT IS SO ORDERED.

Dated: June 6, 1969.

NOEL P. FOX
District Judge

OPINION ON MOTIONS FOR ENTRY OF JUDGMENT AND STAY OF JUDGMENT
(Filed July 25, 1969)

The parties to this suit are before the court for entry of judgment. The court's opinion ordered plaintiff to be reinstated, with back pay and full seniority, in his job with defendant.

Pursuant to Rule 8 of the Federal Rules of Appellate Procedure, defendant employer has moved

for an order staying enforcement of this judgment pending disposition of defendant's appeal to the United States Court of Appeals for the Sixth Circuit, and for fixing an amount of a supersedeas bond required of defendant.

1. Stay of Money Judgment.

In support of its motion, defendant first characterizes the relief granted in this case as "essentially a money judgment." Defendant then claims a stay of such a judgment as a matter of right, if accompanied by giving a supersedeas bond, pursuant to Rules 62 (d) and 73 (d) of the Federal Rules of Civil Procedure. Contrary to defendant's characterization, this remedy obviously involves much more than a money judgment. Reinstatement of Mr. Dewey is to be ordered, and his rights enforced by a permanent injunction. Authority for such a remedy is provided in the statute as follows:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement * * *." 42 USCA §2000e-5 (g).

The court found defendant in violation of the Act, and will proceed to fashion an effective remedy. See pages 8-11 of the court's opinion with respect to defendant's unlawful practices.

Defendant is entitled, however, to a stay of the money judgment for back pay, and this is so ordered.

II. Stay of Reinstatement.

Defendant is clearly not entitled to a stay of an injunction or injunctive type remedies as a matter of right. Rule 62 (d) provides for stay of judgment and supersedeas bond pending appeal "subject to exceptions contained in subdivision (a) of this rule." That subdivision in turn refers to subdivision (c) for the particular rule on injunctions. This rule vests discretion in the court, sitting in equity, to stay an injunction pending appeal under such conditions it deems proper for protection of the rights of the adverse party. The court will therefore consider defendant's motion as addressed to its sound discretion, and will examine the remainder of its contentions in the light of insuring justice to the parties to this lawsuit.

Defendant urges the court to consider four factors in deciding whether to stay reinstatement: (1) whether defendant has made a strong showing that it is likely to succeed on the merits of the appeal; (2) whether defendant will suffer irreparable injury if no stay is granted; (3) whether a stay would substantially harm plaintiff; and (4) the public interest. Each of these points was, in identical or similar form, argued by the defendant in the trial of this case. Each was carefully considered at that time, and disposed of in the court's opinion.

As to point (1), defendant at this hearing sought merely to reargue its case. No new material was presented to the court. Defendant's former arguments do not, in this court's view, amount to a strong showing of success on appeal.

Point (2) was also, in substance, disposed of by the court's opinion in this case. The court found

that defendant would suffer no "undue hardship," under the Equal Employment Opportunity Commission guidelines, by accommodating the religious beliefs of Mr. Dewey. The present contention that reinstatement will "irreparably harm" defendant can fare no better. For purposes of this motion, "undue hardship," and "irreparable harm" can be equated. Defendant presented no evidence of the former at trial, and the affidavit now submitted does not suffice to convince the court of the latter. Defendant's fears of injury continue to be anticipatory and based solely on speculation. The plant is not working overtime now and has not been for over eight months. Defendant's overtime schedule is entirely in the control of management. In addition, Mr. Dewey is not exempt from all overtime work. If overtime problems develop, the court has retained jurisdiction of this matter and its remedy is flexible. Accordingly, there is no hardship whatsoever to defendant in the immediate reinstatement of Mr. Dewey.

Answering point (3), the court is convinced that the only party to be irreparably harmed by a stay of this judgment would be plaintiff. Although he still has a source of income, the record shows that he is not making as much as he would were he reinstated with defendant. Occurring in one of the most inflationary periods in recent history, any wage loss involves added hardship. A stay would, in addition, threaten the skills of a die repairman. If such a skilled worker is kept from his trade, changes in modern technology lead rapidly to obsolescence of knowledge. Plaintiff also faces considerable hardship in the awesome task a person of his means faces when litigating against the corporate resources of a defendant such as Reynolds. A stay would further amplify the effective inequality

of these parties. For these reasons, a stay would irreparably harm the plaintiff.

Defendant's final point concerns the public interest. Defendant foresees grave consequences to its labor bargaining position as a result of reinstating plaintiff. It argues that, because of these predicted consequences, the public interest coincides with that of the corporation. In essence, its position is that avoiding indirect impact upon a large corporation is more consistent with public values than enforcing the constitutional rights of the individual before this court. The heart of this position is nothing more than institutional intransigence.

Defendant's position, framed as above, highlights one of the most important aspects of this case: the relationship of the individual to the overwhelming institutions of modern society. It is true that the corporation and other institutional forms are to a large degree responsible for the current prosperity of the United States. Institutions, however, often grow unsensitive to the human beings they encompass. Government itself has grown overwhelming. But we must not lose sight of the paramount rights of free individuals. Protection of these inalienable rights has been the cornerstone of national policy since the birth of this nation. The Declaration of Independence and the Fourteenth Amendment deal with the inalienable rights of individuals, not institutions. They reflect the basic theme that government and its organs are constituted by men to secure these rights to individual human beings. Congress had this in mind when it enacted Title VII of the Civil Rights Act in 1964:

> "We believe in the inherent dignity of man. He is born with certain inalienable

> rights. His uniqueness is such that we refuse to treat him as if his rights and well being are bargainable." 2 U.S. Cong. Adm. News '64, at page 2517.

One of these inalienable rights is freedom of religion. The First and Fourteenth Amendments to the Constitution and the Civil Rights Act look to securing this right to a single human being.

Following this clear principle, this court believes the public interest in this case to be best served by enforcing the constitutional rights of plaintiff. This is a classic case in which the government of the United States is called upon to secure the rights of a single individual. Defendant's motion to stay reinstatement is hereby denied.

The court will retain jurisdiction of this matter to insure continued protection of plaintiff's rights and provide the flexibility of an open ended remedy should a significant change of circumstances occur, especially with respect to defendant Reynolds. The court is certain that all parties involved can approach this case with the kind of reasonableness that reasonable men can bring to the management of institutions in the economic structure, and will use every effort to reach and maintain an accommodation within the framework of this remedial scheme. It will, however, be present to mediate any disputes affecting matters covered by its decree in this case, and, if necessary to issue additional orders to protect all concerned.

It should be made clear to the parties that the decree and any further action the court may take thereunder extends to individual officers and employees of defendant Reynolds. If necessary, to

insure justice, the union and its officers may also be made a party.

The court believes this form of remedy necessary and appropriate to insure justice in this action. It is within the inherent equity power of District Courts to fashion effective remedies to protect federal rights. Griffin v. School Bd. of Prince Edward County, 377 U.S. 218, 12 L.Ed.2d 256, 84 S.Ct. 1226 (1964). The Supreme Court has encouraged imagination and flexibility in providing remedies to make effective the Congressional purpose:

> "It is for the federal courts to adjust their remedies so as to grant the necessary relief where federally secured rights are invaded. And it is also well settled that where legal rights have been invaded, and a federal statute provides a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." J. I. Case Co. v. Borak, 377 U.S. 426, 12 L.Ed.2d 423, 84 S.Ct. 1555 (1964).

It is to fulfill this duty that the relief in this case is granted.

Engaging in Unlawful Employment Practices
42 USCA §2000e-5 (g).

Defendant argues that, in order to be subject to injunctive relief under 42 USCA §2000e-5 (g), supra, page 2, the court must find specific intent or purpose to discriminate against Mr. Dewey. This is not what the statute requires, either for the substantive violation or the imposition of injunctive relief. Defendant's interpreation is

consistent with neither the language nor purpose of the statute. Defendant has "intentionally engaged" and plans to continue to engage in practices which had the effect of the discrimination the Act forbids:

> "It shall be an unlawful employment practice for an employer:--
> (1) to . . . discharge any individual . . . because of such individual's . . . religion . . ." 42 USCA §2000e-2 (a) (1).

It intentionally and purposely discharged Mr. Dewey for failure to work on Sundays or find a replacement, and would continue to do so if this relief is not granted. By this action, defendant has intentionally engaged in an unlawful employment practice within the meaning of the above provision. Furthermore, defendant's reading of the statute would serve to foreclose effective remedies for violation of this important statute. Congress intended to prevent discrimination when it passed this Act. It must also have intended to provide effective remedies to secure protection under its provisions. Defendant's discharge of plaintiff was found to be discriminatory, and as such, must be subject to the full impact of remedies Congress has chosen to effect its purpose.

Defendant also urges that a "good faith" violation of Mr. Dewey's rights does not render it liable to relief under 42 USCA §2000-5 (g). Defendant cites Richards v. Griffith Rubber Mills, --F. Supp--(D.C. Oreg. 1969) as authority for this contention. This court feels that it must reject the rule adopted by the Richards court. The cases relied on there as basis for a "good faith" exception dealt with governmental and official immunity, and

should not be extended to provide an insulation for private activities based on private contracts. Dodd v. Spokane County, 393 F. 2d 330 (9th Cir. 1968); Pierson v. Ray, 386 U.S. 547 (1967). Such a rule would, for reasons previously mentioned, effectively emaciate Title VII.

Dated: July 25, 1969.

/s/ Noel P. Fox
District Judge

JUDGMENT GRANTING PERMANENT INJUNCTION, AND REINSTATEMENT, CREDIT FOR SENIORITY AND FRINGE BENEFITS, AND BACK PAY
(Filed July 25, 1969)

At a session of said Court, held in the Federal Building in the City of Grand Rapids, Michigan, on the 25th day of July, 1969.

PRESENT: Hon. NOEL P. FOX
District Judge

THIS CAUSE having come on for final hearing and the issues therein having been tried before the Court without a Jury and the evidence of all the parties hereto having been heard, and the Court having duly made findings of fact and conclusions of law in its Opinion rendered on the 6th day of June, 1969 in accordance with Rule 52 (a) of the Rules of Civil Procedure,

NOW THEREFORE, on this 25th day of July, 1969, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. That the Defendant, Reynolds Metals Company, is ordered to reinstate the plaintiff, Robert Kenneth Dewey, forthwith, to the job classification he held at the date of his discharge, September 12, 1966, and that Plaintiff be reinstated with full seniority that would have accrued and inured to his benefit if he had not been discharged. FURTHER, that the Plaintiff be made whole upon reinstatement by receiving full credit for all fringe benefits that would have accrued and inured to his benefit if he had not been discharged.

2. The Defendant, Reynolds Metals Company, its employees, agents, servants, attorneys, and privies, and each of them are hereby permanently enjoined and restrained from requiring the Plaintiff, Robert Kenneth Dewey, to perform work for the Defendant on Sundays.

3. The injunctive relief provided in Paragraph 1 and 2 of the Judgment is granted in accordance with and pursuant to Title VII of the Civil Rights Act of 1964, Section 706 (5) (g), 42 USC Section 2000e-5 (g), and Rule 65 (d) of the Rules of Civil Procedure for the United States District Courts, for the following reasons:

(a) In discharging Plaintiff, Defendant violated Title VII of the Civil Rights Act of 1964 in discriminating against Plaintiff because of Plaintiff's religion.

(b) In assigning Sunday overtime work to Plaintiff, Defendant failed to reasonably accommodate the religious needs of Plaintiff and Defendant has not demonstrated that undue hardship on the conduct of Defendant's business would result from accommodating

Plaintiff's religious beliefs concerning his working on Sunday and concerning his inducing another person to work on Sundays.

(c) Reinstatement is a remedy specifically permitted by the Act and is necessary to avoid irreparable harm to the Plaintiff and such remedy will not cause undue hardship on the conduct of the Employer's business.

4. IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Plaintiff recover from the Defendant back pay. Said Judgment for back pay shall relate to a period of time from August 1, 1967, through and including the date of reinstatement. Said amount is determined to be $7,286.92 for that period of time from August 1, 1967, through June 6, 1969. Upon reinstatement of the Plaintiff, there shall be added to this amount, an amount which represents the Plaintiff's lost wages from June 6, 1969, to the date of reinstatement. Said amount shall be determined by subtracting the Plaintiff's actual income earned during said period of time from an income average of the income earned by the two employees in the die repair classification, one whose seniority is immediately senior to the Plaintiff, and one whose seniority is immediately junior to the Plaintiff for said period of time. In determining said income average, no income earned on Sundays shall be included in arriving at said average.

5. The Court expressly retains jurisdiction of the case, to review agreements reached by the parties pursuant to this opinion, or to issue whatever orders are necessary to insure that the religion of Defendant's employees is properly respected and fairly accommodated; and for the further purpose

of providing the parties a forum in which to seek recourse should circumstances change with respect to the effect of reasonable accommodation of Plaintiff's religious beliefs upon the conduct of the Employer's production schedules and Management-Labor relations.

The reasons for retaining jurisdiction and for the injunctive relief are set out in the Court's opinion dated June 6, 1969 as follows:

> "Moving to the second half of the Equal Employment Opportunity Commission test, the Defendant has not demonstrated any undue hardship. As stated earlier, full opportunity was given for any and all relevant facts to be presented. Yet the only factor tending to show hardship was that ten years ago there was some difficulty scheduling production on Sunday. This is not the type of hardship envisioned by the guidelines:
>
> > 'Such undue hardship, for example, may exist where the employee's needed work cannot be performed by another employee of substantially similar qualification during the period of absence of the Sabbath observer.'
>
> "Dewey's case is just the opposite. There were always several available employees who could perform his work.
>
> "The other facts cited to show hardship by Defendant are not part of the stipulated facts, and are not properly before the Court.

"Defendant alludes to the possibility that this exception would open the door to other exceptions not based on religion. This is pure speculation which is not supported by logic. Sherbert, supra, 374 U.S. at 407. Other exceptions are not authorized, indeed mandated, by federal law. There is no reason why an accommodation cannot be made relative to religious beliefs, and limited thereto.

"Thus plaintiff prevails under both definitions of discrimination. The overtime procedures of defendant, as applied, violated the Civil Rights Act of 1964.

"The fashioning of a remedy presents a serious problem, because a reasonable accommodation is better worked out by agreement of the parties than by fiat of the court. For this reason, the only affirmative relief which will be awarded at this time is that plaintiff be returned to work, with back pay from August 1, 1967.[1]

"As to further accommodations which should be made in accordance with this opinion, the parties are asked to reach a solution acceptable to all concerned. Such a solution might include the defendant's obtaining qualified substitutes or a shared overtime type of arrangement whereby the people who could not

[1] "The guidelines became effective July 10, 1967. Before then defendant was not on notice as to the meaning of the statute. But in a reasonable time after the effective date an accommodation should have been worked out August 1, 1967 is such a time."

work Sundays would work overtime on other days of the week.

"These are merely suggestions. The parties know which types of accommodations are best suited to their particular needs. It is also suggested that the union be a party to negotiations concerning an acceptable change in the contract, so that the contract will conform to the law.

"The court expressly retains jurisdiction of the case, to review agreements reached by the parties pursuant to this opinion, or to issue whatever orders are necessary to insure that the religion of defendant's employees is properly respected and fairly accommodated."

6. IT IS FURTHER ORDERED THAT enforcement of this Judgment shall be stayed for ten (10) days after entry of this Judgment.

NOEL P. FOX
District Judge

ORDER STAYING EXECUTION IN PART
(Filed July 25, 1969)

At a session of said Court, held in the Federal Building in the City of Grand Rapids, Michigan, on the 25th day of July, 1969.

PRESENT: Hon. NOEL P. FOX, District Judge

THIS CAUSE having come on for hearing on the Motion of Defendant for a stay of execution of the Judgment entered in the above-entitled cause on

the 25th day of July, 1969, pending Defendant's appeal of said Judgment, counsel for Plaintiff and Defendant present, and the Court being advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that upon the timely filing of Notice of Appeal by the Defendant, and upon the filing of a supersedeas bond in the amount of $15,000.00, that execution on that portion of the Judgment hereinbefore entered, and specifically Paragraph 4, awarding damages for back pay is hereby stayed pending a final disposition of this cause in appeal.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that execution upon the injunctive relief granted in Paragraphs numbered 1 and 2 of the Judgment hereinbefore entered SHALL NOT be stayed after the expiration of ten (10) days from the date said Judgment was entered for the following reasons:

1. It is the finding of the Court that if the Plaintiff is not reinstated promptly, he will suffer irreparable harm inasmuch as he is a skilled tradesman in an industry that is changing. If the Plaintiff were required to await final disposition of this cause, his skills would become obsolete and unmarketable.

2. It is the further finding of the Court that the Defendant will suffer no irreparable harm or undue hardship by reinstating the Plaintiff.

3. The Court has expressly retained jurisdiction of this cause so that, if circumstances change and the hardships which the Defendant anticipates, become real instead of speculative, Defendant may seek further relief from this Court at such time.

THIS ORDER is granted in accordance with Rule 62 (a), 62 (c) and 62 (d) of the Rules of Civil Procedure for United States District Courts and is in accordance with the United States Supreme Court's mandate that the District Court's exercise flexibility and imagination in shaping remedies and providing relief under the Civil Rights Act of 1964, Pub. L. 88-352, Title VII, Section 706, July 2, 1964, 78 Stat 259, 42 USC Section 2000e-s.

NOEL P. FOX
District Judge

TRANSCRIPT OF PROCEEDINGS
(Filed August 1, 1969)

EXCERPT from proceedings had in the above entitled cause before the Honorable NOEL P. FOX, on the 16th day of July, 1969, at Grand Rapids, Michigan.

APPEARANCES:

MESSRS: VANDER VEEN, FREIHOFER & COOK,
By Donald F. Oosterhouse, Esq.,
and Peter R. Tolley, Esq.,
Appearing for Plaintiff

MESSRS: CROSS, WROCK, MILLER & VIESON,
By William A. Coughlin, Jr.,
Esq., Appearing for Defendant.

THE COURT: This case did not rest entirely upon the Sherbert doctrine. An important aspect of the predicate of the case was the guidelines of

the Equal Employment Opportunity Commission, which were adopted pursuant to Congressionally delegated authority. Such guidelines, adopted by an implementing or enforcing agency, are to be given consideration in the interpretation and application of the law. Accordingly, this court accepted these guidelines and applied them in this case.

The undue hardship mentioned above and the irreparable harm defendant now urges as grounds for a stay of judgment are equated. At the time of the decision in this case, I found that the employer had not demonstrated undue hardship; I likewise find at this time that no irreparable harm would result by not staying this judgment.

The uniquely skilled character of the die repairman is evidenced by the ratio of die repairmen to the total employment of Reynolds Metals in this plant. It is a skilled trade that by lack of use can become obsolete. I know something about die repair job classification from first hand observation with the War Labor Board, Wage Stabilization Branch, in connection with establishing wage brackets and job classifications in specific industries, mediation and decision in disputes and individual grievances handled by that office and the United States Conciliation-Mediation Service. I also served as a member of the State Labor Mediation Board and as Chairman of that Board.

From that experience it is my considered judgment that the party who would endure irreparable harm in this case would be Mr. Dewey. Nothing in the defendant's affidavit, which, again, was not presented with opportunity for cross-examination at the trial itself, is sufficient to alter the findings of

the court that Reynolds failed to establish sufficient basis for undue hardship under the Equal Employment Opportunity Commission guidelines.

I do believe that the money judgment involved should, in justice, be stayed. However, I see no hardship whatsoever in the immediate reinstatement of Mr. Dewey. Reynolds' work overtime schedule is within the complete control of management. Mr. Dewey is not necessarily exempt from overtime work. He can do so by assignment during the pendency of this action on any days other than Sunday. If the plant is operating seven days a week, it will probably be operating on more than one shift. They may have additional overtime arrangements that can be worked out. These are practical matters that I know from experience can be worked out without causing the catastrophies which are predicted by the defendant.

I am sure that the company and the union can approach this case with the kind of reasonableness that reasonable men can bring to the management of the affairs of institutions in the economic structure.

There is one obvious lesson in a case such as this. We must not forget that we are living in an age of overpowering institutions. One need only look to the trend toward consolidation of corporate wealth, to the strength of modern unions and the extent of organization needed for the functioning of space-age technology to be convinced of the impact of modern institutions.

In this particular case, we deal with the corporation, the union, and the individual's relation to these institutions. The Constitution of the United States and the Declaration of Independence look to

the individual, the human being. They talk about inalienable rights of human beings, not institutions. They reflect the basic theme that government is constituted among men to secure these inalienable rights. And it is in these very fountainheads that we find the reason why I am sitting here as a judge in a Federal Court, and why the Congress and other branches of government exist; to secure basically, first and fundamentally, the inalienable rights of a human being.

One of these inalienable rights is freedom of religion. The First and Fourteenth Amendments to the Constitution and the Civil Rights Act look to securing to the individual--a human being created in the image and likeness of God--this inalienable right, which was declared national policy at the birth of this nation.

This is a classical case in which the government of the United States is called upon to secure the inalienable right of a single human being. It is therefore the judgment of this court that if this judgment were stayed, in light of all that is before the court at the present time, the only one to suffer irreparable harm would be the single individual who stands before this court.

* * *

REPORTER'S CERTIFICATE

I, Gloria Coppin, do hereby certify that I am the official court reporter for the District Court of the United States for the Western District of Michigan; that I reported the proceedings in the above-entitled cause on the date shown, and that the foregoing is a true and correct transcript of my stenotype notes taken at said proceedings.

GLORIA COPPIN
U.S. District Court Reporter

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH COURT
(Decided and filed June 4, 1970)

Before Weick and Combs, Circuit Judges, and O'Sullivan, Senior Circuit Judge.

Weick, Circuit Judge. The action in the District Court was brought under the provisions of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e.

Plaintiff's (Dewey's) claim was that he was wrongfully discharged by his employer, the defendant, Reynolds Metals Company (Reynolds), because of his religious beliefs, and he prayed for reinstatement with back pay.

Prior to bringing the action, Dewey filed grievances with Reynolds on the identical claim set forth in his complaint, under the provisions of a collective bargaining agreement entered into by Reynolds with Local 277, United Automobile Aerospace and Agricultural Workers of America, AFL-CIO (UAW), which was the bargaining representative of Reynolds' employees. Dewey was a member of UAW. The grievances were processed and resulted in their submission to a mutually agreeable arbitrator, who made an award denying them on June 29, 1967.

Contemporaneously with the submission of the grievances, Dewey made application to the Michigan Civil Rights Commission for issuance of a complaint against Reynolds, alleging discrimination on account of his religious beliefs.

The following is a Summary of Findings and Order of Dismissal, entered by the Commission on December 13, 1966:

"The findings indicate that the claimant, despite due notice of overtime requirements by the company and the applicable Collective Bargaining Agreement provisions, continued to refuse to perform scheduled overtime work on Sundays and took the position that his right to continued employment while following his religious belief without interference was an absolute right.

"The Commission has previously ruled that where the normal work week and foreseeable overtime requirements are prescribed in a Collective Bargaining Agreement, that absent or (sic) intent on the part of respondent to discriminate on religious grounds, an employee is not entitled to demand any alteration in such requirement to accommodate his religious beliefs.

"The investigation did not reveal any intent on the part of the respondent to discriminate on religious grounds and it is, therefore, recommended that this application for the issuance of a complaint be denied for lack of probable cause.

ORDER OF DISMISSAL

"The Commission has found insufficient grounds on which to issue a Complaint and, therefore, the above Application is herewith denied. This Order of Dismissal shall automatically become effective within 15 days from

the date of mailing unless the Claimant shall demand a hearing prior thereto." (App. 93a-94a)

Dewey requested the United States Office of Federal Contract Compliance to review his charges of religious discrimination, and that office found no basis for a charge of discrimination.

On January 4, 1967, Dewey filed a charge with Equal Employment Opportunity Commission (EEOC), claiming religious discrimination. The Commission, on January 5, 1967, contrary to the recommendation of its Regional Director that the Commission find no probable cause, determined that there was reasonable cause to believe that Reynolds had engaged in unlawful employment practices and authorized the bringing of the present action in the District Court. Reynolds moved for dismissal of the complaint filed in the District Court on the grounds that the arbitrator's award was a final adjudication of the grievances and that they could not be relitigated. The District Judge, in a memorandum opinion, denied the motion to dismiss. 291 F. Supp. 786 (W. D. Mich. 1968).

Reynolds then answered, denying it discriminated against Dewey on account of his religion and pleaded provisions of the collective bargaining agreement which required employees to perform all straight time and overtime work required of them by the company. Reynolds further alleged that Dewey refused to perform overtime work on Sundays or to arrange for another qualified employee to replace him, basing his refusal on his religious convictions. Reynolds, after giving warnings and a three-days' layoff, finally discharged Dewey under

its plant rules for his continued refusal to comply with the provisions of the collective bargaining agreement.

The parties stipulated the facts and the case was tried by the Court without a jury. In a memorandum opinion, the District Judge ruled in favor of Dewey. He ordered Reynolds to reinstate Dewey with back pay and enjoined Reynolds from requiring Dewey to work on Sundays. 300 F. Supp. 709 (W.D. Mich 1969). The District Court refused to stay execution on the reinstatement pending appeal, and required Reynolds to post a $15,000-bond to stay execution on the judgment of $7,286.92 for back pay. 304 F. Supp. 1116 (W.D. Mich. 1969). Reynolds appealed. We reverse.

The applicable statute is 42 U.S.C. § 2000e-2 (a), which provides as follows:

> "(a) It shall be an unlawful employment practice for an employer --
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . . "

The legislative history of the statute is clear that it was aimed only at discriminating practices. Congressional Record, Vol. 110, pages 13079-13080, June 9, 1964.

In order to prove a violation of the Act it was incumbent on Dewey to establish by a preponderance

of the evidence that his employer discriminated against him on account of his religion. In 1964 U.S. Code Cong. & Adm. News, page 2515, it is stated:

> "A substantial number of committee members, however, preferred that the ultimate determination of discrimination rest with the Federal judiciary . . . . In addition, we believe that the employer or labor union will have a fairer forum to establish innocence since a trial de novo is required in all district court proceedings together with the necessity of the Commission proving discrimination by a preponderance of the evidence."

On page 2516 it is stated:

> "Similarly, management prerogative and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices."

Reference to the collective bargaining agreement indicates rather clearly that the provisions with respect to straight time and overtime work apply to all employees equally and do not discriminate against Dewey or any other employee.

Reynolds operated a "job type" plant, producing, on order, aluminum extrusions and billets. It was necessary therefore for production to be scheduled to meet delivery dates provided for in contracts with customers.

Prior to the 1960 collective bargaining agreement, overtime was performed by employees on a voluntary basis. As a result thereof, with an increase in orders it became impossible to schedule production on Saturdays and Sundays. In order to remedy this difficulty, Reynolds negotiated with UAW the 1960 and 1965 collective bargaining agreements which provided that the company had the right to set straight time and overtime schedules and the employees were obligated to work such schedules unless they had a substantial and justifiable reason for not doing so. The 1965 agreement provided:

> "All employees shall be obligated to perform all straight time and overtime work required of them by the Company except when an employee has a substantial and justifiable reason for not working; provided, however, that no employee shall be required to work more than twelve (12) continuous hours without his consent."

The agreement provided time-and one-half for work on Saturdays and double time for work on Sundays.

The agreement further provided that overtime work shall be divided as equally as possible. If more employees are needed they are assigned in the inverse order of their seniority. Reynolds also issued an interpretation that any employee assigned to overtime could be relieved from the assignment simply by arranging for another qualified employee to replace him. This system was used extensively.

Dewey had been employed by Reynolds in various capacities since 1951, and at the time of his discharge,

on September 12, 1966, was a die repairman. Since 1961 Dewey has been a member of Faith Reformed Church. He never volunteered for overtime work on Sunday after joining the church although he did volunteer for other days.

Dewey was scheduled to work on Sunday, November 21, 1965. He refused to work because of his religious beliefs. He was given a warning and informed as to the necessity of a seven-day operation and was advised that a repetition would lead to disciplinary action under Plant Rule 11, which prohibits "absence from work without reasonable cause", and provides a three-offense progression of punishment with discharge for the third offense.

Between January and August, 1966, Dewey was scheduled to work on five Sundays. He obtained replacements as provided in the contract. On August 28, 1966, he was scheduled again to work on Sunday, and he not only refused to work but also refused to obtain a replacement on the ground of his religious beliefs. The arbitrator found:

> "(Dewey, it will be recalled, accelerated his disciplinary timetable by telling Zagman (a fellow employee) not to serve as a replacement any more.)"

On September 4, 1966, Dewey refused to work or to obtain a replacement. He was given a written warning and a disciplinary layoff of three days. Again he refused to work or to obtain a replacement on September 11, 1966, and was discharged for violation of Plant Rule 11.

We find nothing discriminatory in the provisions of the collective bargaining agreement or in

the manner in which Reynolds executed it. In our opinion, it provided a fair and equitable method of distributing the heavy workload among the employees without discrimination against any of them.

The District Judge found that the compulsory overtime provision of the collective bargaining agreement "is not discriminatory on its face." We agree. However, he said this is only the first step. He found it was discriminatory in its impact. We disagree. He relied on Sherbert v. Verner, 374 U.S. 398 (1963); but this case involved state, and not private action.

In reaching his decision that the collective bargaining agreement discriminated against Dewey, the District Judge applied retroactively Regulation 1605.1, adopted by EEOC effective July 10, 1967, which was nearly ten months after Dewey had been discharged and after the arbitrator and the Michigan Civil Rights Commission had rejected Dewey's charges.

In our opinion, it would have been more appropriate for the District Court to have applied the EEOC Regulation 1605.1 which was in force at the time of Dewey's discharge, and which became effective June 15, 1966.

The 1966 regulation contained the following provisions which restricted any obligation upon the part of the employer to accommodate to the reasonable religious needs of his employees:

Section 1605.1 (a):

"(3) However, the Commission believes that an employer is free under Title VII to

establish a normal work week (including paid holidays) generally applicable to all employees, notwithstanding that this schedule may not operate with uniformity in its effect upon the religious observances of his employees. For example, an employer who is closed for business on Sunday does not discriminate merely because he requires that all his employees be available for work on Saturday."

Section 1605.1 (b):

"(3). The employer may prescribe the normal work week and foreseeable overtime requirements, and, absent an intent on the part of the employer to discriminate on religious grounds, a job applicant or employee who accepted the job knowing or having reason to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs."

The 1967 regulation, retroactively applied by the District Court, omitted the above quoted language and other material parts of the 1966 regulation, and instead of providing definite guidelines for the assistance of employers who might be affected, left the matter largely on an ad hoc basis for the decision of the Commission on the particular facts of each case.

It is clear that Reynolds complied with the 1966 regulation. The obligations contained in the collective bargaining contract, which were lawful under the regulations of EEOC then in effect, ought not to be impaired by the application of a subsequently passed inconsistent regulation.

The District Judge took into account his ex post facto application of the 1967 EEOC regulation by starting Dewey's back pay from August 1, 1967, instead of from the date of his discharge, holding that this date was a reasonable time after the 1967 regulation became effective for the company to work out accommodation to it. The trouble with this treatment is that Dewey was no longer in the employ of Reynolds. Having a lawful right at the time to discharge Dewey under the 1966 regulations, Reynolds ought not to be required to re-employ him at a later date and pay his back salary merely because EEOC decided to change the rule by adopting new, inconsistent regulations. The rights of Dewey and Reynolds were governed by the law in effect at the time of the discharge. EEOC could not affect these rights by subsequently adopting a new regulation.

The Act further provides:

> "No order of the court shall require . . . the hiring, reinstatement or promotion of an individual employee, or the payment to him of any back pay, if such individual . . . was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3 (a) of this title." 42 U.S.C. § 2000e-5 (g).

The reason for Dewey's discharge was not discrimination on account of his religion; it was because he violated the provisions of the collective bargaining agreement entered into by his union with his employer, which provisions were applicable equally to all employees. The violation consisted not only of his refusing to work on Sundays, but also his refusing to arrange for a replacement, which was an alternate

procedure. He did arrange for five replacements, but later refused even to do this, claiming that it was a sin. He apparently did not regard it as sinful for him to collect wages from an employer who was compelled to schedule overtime production in order to meet its contractual commitments and eventually meet its payroll.

To accede to Dewey's demands would require Reynolds to discriminate against its other employees by requiring them to work on Sundays in the place of Dewey, thereby relieving Dewey of his contractual obligation. This would constitute unequal administration of the collective bargaining agreement among the employees, and could create chaotic personnel problems and lead to grievances and additional arbitrations. The practice of permitting the employee, rather than the employer, to secure the replacement served to insulate the employer against any charge of unequal naming of replacements.

But even if the 1967 regulations are applied, we think that Reynolds complied with Section 1605.1 (b) thereof by making a reasonable accommodation to the religious needs of its employees when it permitted Dewey, by the replacement system, to observe Sunday as his Sabbath.[1] He stubbornly refused to exercise this privilege. The finding of the District

[1] It should be observed that it is regulation 1605.1 (b) and not the statute (§ 2000e-2(a)) that requires an employer to make reasonable accommodation to the religious needs of its employees. As we have pointed out, the gravamen of an offense under the statute is only discrimination. The authority of EEOC to adopt a regulation interfering with the internal affairs of an employer, absent discrimination, may well be doubted.

Court that Reynolds did not make reasonable accommodations to the religious needs of Dewey is not supported by substantial evidence and is clearly erroneous. Rule 52 (a) Fed. R. Civ. P.

The District Court referred to the inalienable right of freedom of religion, which he said is protected by the First and Fourteenth Amendments to the Constitution and the Civil Rights Act. The employer did not question Dewey's right to freedom of religion; Reynolds did question Dewey's right to practice his religious beliefs on it and to interfere with the operation of its plant.

An additional defense is provided in the first sentence of 42 U.S.C. §2000-5(g), which provides:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice)."

This section of the statute requires a finding that the employer has intentionally engaged in an unlawful employment practice before the court may award relief. Richards v. Griffith Rubber Mills, 300 F. Supp. 338, 341 (D. Ore. 1969).

It can hardly be said that Reynolds intentionally violated the Act when no discrimination was found

by either the Michigan Civil Rights Commission, the Office of Federal Contract Compliance, the arbitrator chosen by agreement of the parties, or the Regional Director of the EEOC in Cleveland. In addition, in order to support his finding of an unlawful employment practice, the District Judge had to apply regulations adopted subsequent to the employee's discharge and ignore those in force at the time the alleged violation took place. The finding of the District Court that there was an intentional violation of the Act is not supported by substantial evidence and is clearly erroneous. Rule 52(a) Fed. R. Civ. P.

Effect of the Arbitration

It is clear that if the arbitrator of the grievances had granted an award to Dewey, instead of to Reynolds, the award would have been final, binding and conclusive on Reynolds. Reynolds would not have been permitted to relitigate the award in the courts. This is the teaching of the United Steelworkers trilogy, which clearly defined the respective functions of the courts and the arbitrator. United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 to 602 (1960); Washington v. Aerojet-General Corp., 282 F. Supp. 517 (C.D. Cal., 1968).

In Steelworkers, the Court said:

"When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." (Id. at 569)

The arbitrator had jurisdiction to determine the grievances. The arbitration involved an interpretation of the collective bargaining agreement with respect to Dewey's claims that he had been laid off and discharged because of his religious beliefs. In arbitration proceedings, frequently questions of law and fact are resolved by the arbitrator. Where the grievances are based on an alleged civil rights violation, and the parties consent to arbitration by a mutually agreeable arbitrator, in our judgment the arbitrator has a right to finally determine them. Any other construction would bring about the result present in the instant case, namely, that the employer, but not the employee, is bound by the arbitration.

This result could sound the death knell to arbitration of labor disputes, which has been so usefully employed in their settlement. Employers would not be inclined to agree to arbitration clauses in collective bargaining agreements if they provide only a one-way street, i. e., that the awards are binding on them but not on their employees.

The tremendous increase in civil rights litigation leads one to the belief that the Act will be used more frequently in labor disputes. Such use ought not to destroy the efficacy of arbitration.

In the supplemental brief of EEOC as amicus curiae, the case of Smith v. Evening News, 371 U.S. 195, 197-198 (1962), is cited for the proposition that "the complainant is not required to elect between his contractual rights or his statutory rights but may seek to vindicate his claim in contractual and statutory proceedings." (EEOC Supp. Brief, p. 3). The writer of the brief neglected to state that the collective bargaining agreement in Evening News

contained no grievance arbitration procedure which had to be exhausted before recourse could be had to the courts. 371 U.S. 196, fn 1.

The question in our case is not whether arbitration and resort to the courts could be maintained at the same time; rather our case involves the question whether suit may be brought in court after the grievance has been finally adjudicated by arbitration.

We see no good analogy between jurisdiction of the National Labor Relation Board and that of EEOC. The Labor Board has adjudicatory powers over unfair labor practices, subject only to judicial review. Orders of the Board may be vacated on review only when they are not supported by substantial evidence upon consideration of the record as a whole. EEOC, on the other hand, has no such power. The District Court considers EEOC cases de novo. The legislative history, from which we have previously quoted, indicates the reason for the difference.

Nor do we find any national policy for ousting arbitrators of jurisdiction to finally determine grievances initiated by employees, based on alleged violation of their civil rights.

The judgment of the District Court is reversed and the cause is remanded with instructions to dismiss the complaint.

Combs, Circuit Judge, dissenting. I respectfully dissent. In my opinion the District Court correctly concluded that the company had not complied with Title VII of the Civil Rights Act in that it failed to make reasonable accommodation to Dewey's religious beliefs.

The Equal Employment Opportunity Commission was formed to further the purposes of the Act, 42 U.S.C. §2000(c)-4, and was granted power to promulgate regulations consistent with the provisions of the Act. 42 U.S.C. § 2000(e)-12(a). The Commission's interpretation of the Act is persuasive although not binding on this Court. It was said in Udall v. Tallman, 380 U.S. 1, 16 (1965): "[T]his Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration," citing Unemployment Commission v. Aragon, 329 U.S. 143, 153 (1946); Gray v. Powell, 314 U.S. 402 (1941); and Universal Battery Co. v. United States, 281 U.S. 580 (1930)

Pursuant to its statutory authority, the Commission issued Regulation Section 1605.1, effective July 10, 1967, which provides, inter alia:

> "(b) The Commission believes that the duty not to discriminate on religious grounds, required by section 703(a)(1) of the Civil Rights Act of 1964, includes an obligation on the part of the employer to make reasonable accommodations to the religious needs of employees and prospective employees where such accommodations can be made without undue hardship on the conduct of the employer's business....
>
> "(c) Because of the particularly sensitive nature of discharging or refusing to hire an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable."

As the majority opinion correctly points out, the 1967 Regulations were not in effect at the time of Dewey's discharge. However, the 1966 Regulations, which were in effect at that time, also provided that "the duty not to discriminate on religious grounds includes an obligation on the part of the employer to accommodate the reasonable religious needs of employees and, in some cases, prospective employees where such accommodations can be made without serious inconvenience to the conduct of the business." It is thus apparent that the cornerstone of both the 1966 and 1967 Regulations is the obligation of the employer to accommodate the religious needs of employees where such accommodations can be made without undue hardship on the conduct of the employer's business.

This is a reasonable interpretation of the Act. So, the test is whether the company has made reasonable effect to accommodate Dewey's religious beliefs. The only accommodation to which the company points, in addition to requesting volunteers, is the privilege extended to Dewey to obtain replacement for his Sunday overtime assignments. The majority views the existence of this privilege as a reasonable accommodation to Dewey's religious needs, and notes that "he stubbornly refused to exercise this privilege." This "stubborn" refusal on Dewey's part was grounded in his belief that working on Sunday is inherently wrong and that it would be a sin for him to induce another to work in his place. The replacement system was therefore no solution to Dewey's problem. There is a significant failure by the company to show that it could not have obtained a replacement for Dewey without hardship or inconvenience. There is also no showing that Dewey's failure to work himself or to obtain a replacement would have seriously disrupted work schedules or internal discipline. I find

no support in the record for the assertion in the majority opinion that to grant Dewey's request would cause "chaotic personnel problems and lead to grievances and additional arbitrations." I think the company has completely failed to show that Dewey's refusal to work on Sunday would create undue hardship on the conduct of its business.

Nor am I impressed with the argument that to grant Dewey's request would necessarily affect the company's contractual right to require overtime work. No evidence was adduced on this point. The company may not stand flatfootedly on its contractual right to require overtime work. Provisions of the contract must give way to constitutional mandates and valid statutory enactments. The First Amendment right to freedom of religion has always been recognized as one of the Bill of Rights' strongest mandates. Even though this right has not been extended into the field of labor relations, section 703 (a) (1) of the Civil Rights Act is a Congressional directive that reasonable accommodation should be made by management to the religious beliefs of employees when this can be done without undue hardship on the employer. The District Judge did not apply the First and Fourteenth Amendments to the bargaining agreement here involved, but placed his reliance on Title VII of the Act and specifically stated that he did not find it necessary to reach the question whether plaintiff's constitutional rights had been violated.

Lastly, I am unable to agree that Dewey made an election of remedies by first pursuing the grievance procedure under the bargaining agreement and that he is thereby precluded from maintaining this action. Dewey's rights under the collective bargaining agreement and those created by Title VII of the

Act are separate and distinct. The election of remedies doctrine therefore does not apply. See Bowe v. Colgate Palmolive Company, 416 F. 2d 711 (7th Cir. 1969); Bankers Trust Co. v. Pacific Employers Ins. Co., 282 F. 2d 106, 110 (9th Cir. 1960). The Seventh Circuit held in Bowe that a plaintiff suing under 42 U.S.C. § 2000 (e) could "utilize dual or parallel prosecution both in court and through arbitration so long as erection of remedy was made after adjudication so as to preclude duplicate relief which would result in an unjust enrichment or windfall to the plaintiffs."

I would affirm the judgment.

(In the United States Court of Appeals for the Sixth Circuit - No. 19746)

ORDER

A majority of the Judges of this Court having voted against a rehearing en banc, it is ORDERED that the petition for rehearing be referred to the panel for final disposition. Judges Edwards and McCree voted in favor of a rehearing en banc.

Entered by order of the Court.

(s) Carl W. Reuss
Clerk

(In the United States Court of Appeals for the Sixth Circuit - No. 19746)

OPINION ON PETITION FOR REHEARING

Before Weick and McCree*, Circuit Judges, and O' Sullivan, Senior Circuit Judge.

Weick, Circuit Judge. It is contended that we have adopted a narrow construction of the Civil Rights Act and the Regulations adopted by EEOC thereunder. We submit that we have not. The legislative history of the Act expresses a clear Congressional intent to inhibit only discrimination against an individual because of his race, color, religion, sex or national origin. The plain language of the statute, Section 2000e-2 (a) of Title 42, is susceptible of no other meaning.

Nowhere in the legislative history of the Act do we find any Congressional intent to coerce or compel one person to accede to or accommodate the religious beliefs of another. The requirement of accommodation to religious beliefs is contained only in the EEOC Regulations, which in our judgment are not consistent with the Act.

The collective bargaining agreement, by which all employees were obligated to perform straight

*Judge McCree was designated by the Chief Judge as the third member of the panel, to take the place of Judge Combs who resigned as a member of the Court on June 5, 1970, prior to the filing of the petition for rehearing. The designation was made in order that Judge McCree may file a dissent expressing his views.

time and overtime required of them by the company, was equally and uniformly applied to all of the employees, and it discriminated against no one.

To construe the Act as authorizing the adoption of Regulations which would coerce or compel an employer to accede to or accommodate the religious beliefs of all of his employees would raise grave constitutional questions of violation of the Establishment Clause of the First Amendment. It is settled that the Government, in its relations with religious believers and nonbelievers, must be neutral. The Government is without power to support, assist, favor or handicap any religion. See Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962); Torcaso v. Watkins, 367 U.S. 488 (1961); Everson v. Board of Educ. 330 U.S. 1 (1947); Prince v. Massachusetts, 321 U.S. 158 (1944).

In Braunfeld v. Brown, 366 U.S. 599 (1951), the Court upheld a state Sunday Closing Law against the contention that it operated to prohibit the free exercise of appellant's religion which observed Saturday as the Sabbath.

No one disputes Dewey's right to his religious beliefs. The question is whether he has the right to impose his religious beliefs on his employer and interfere with the operation of its plant. As Mr. Justice Douglas pointed out in his concurring opinion in Sherbert v. Verner, 374 U.S. 398 (1963), the religious beliefs of individuals may take on many forms. He mentioned specifically only a few, including Moslems, who attend a mosque on Friday and pray five times daily; Sikh, who carry a symbolic or regular sword; Quakers who affirm instead of swearing;

and Seventh Day Adventists, who observe Saturday as Sabbath and eat only certain meats.

The arbitrator in his award stated that an employee might even join a religious organization which observed Wednesday as Sabbath.

It is argued that under EEOC Regulations the employer is required to make only reasonable accommodations to the religious needs of his employees. The employee may claim that all of his religious needs are reasonable, irrespective of discrimination, and file charges with EEOC against his employer for failure to accommodate them. An employer with thousands of employees could certainly be harassed by the filing of many of such claims. This would also present serious problems for labor organizations to cope with.

Congress did not intend that employers or labor organizations should be harassed with respect to claims not involving discrimination. In the legislative history of the Act it is stated:

> "Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices." 1964 U.S. Code Cong. & Adm. News, at 2516.

The fundamental error of Dewey and the Amici Curiae is that they equate religious discrimination with failure to accommodate. We submit these two concepts are entirely different. The employer ought not to be forced to accommodate each of the varying religious beliefs and practices of his employees.

Dewey entered the employ of Reynolds before he acquired his religious beliefs. The 1960 collective bargaining agreement was also entered into prior to that time. After he acquired his religious beliefs, his employer did endeavor to make accommodation to the religious beliefs of its employees by interpreting the agreement so as to permit any employee assigned to overtime to be relieved from the assignment simply by arranging for another qualified employee to replace him. We hold that this was a reasonable accommodation.

Dewey, with no difficulty, did arrange for replacements on five different occasions, and then he decided not only that it was a sin for him to obtain a replacement, but the arbitrator found specifically that Dewey told his replacement, Zagman, "not to serve as a replacement any more."

While it was stipulated that Dewey was sincere in his beliefs, he offered no proof that the tenets of his church forbade his designating a replacement to serve in his place on Sundays. The fact that he was sincere in his beliefs gave him no greater rights.

Moreover, the retroactive application of the 1967 Regulations to the 1966 discharge is justified by EEOC in its amicus brief, with the assertion that its Regulations are only "interpretations" and that "the timing of the Commission interpretations is irrelevant" since the 1966 Regulation is now a "defunct Commission guideline." Although defunct in 1967, it was certainly in full force and effect in 1966 and authorized the employer to prescribe

> "the normal work week and foreseeable overtime requirements and absent an intent to discriminate on religious grounds, a job applicant

> or employee who accepted the job knowing or having reasonable grounds to believe that such requirements would conflict with his religious obligations is not entitled to demand any alterations in such requirements to accommodate his religious needs."

Dewey did not acquire his religious beliefs until after his employer had entered into the 1960 collective bargaining agreement which required all employees to work overtime. Dewey thus had actual knowledge that the requirements of the collective bargaining agreement would conflict with his subsequently acquired religious needs. Under the regulations in force at the time, which EEOC claims are now defunct, the employer was under no obligation to accommodate. There was no claim that the employer intended to discriminate on religious grounds. These regulations had the force and effect of law. Their subsequent repeal, after the discharge, ought not to affect the rights or obligations of either party.

The simple answer, however, to all of Dewey's claims is that the collective bargaining agreement was equal in its application to all employees and was uniformly applied, *discriminating* against no one.

Effect of the Arbitrator's Award

The case of Culpepper v. Reynolds Metals Co., 421 F. 2d 888 (5th Cir. 1970), is relied on in support of the proposition that an employee may utilize both arbitration and an action under Title VII of the Civil Rights Act. In Culpepper, however, only a grievance was filed, which was never processed through arbitration. Culpepper involved racial discrimination, which a majority of the panel thought was so serious as to impose --

". . . the duty on the courts to make sure that the Act works . . ."

Circuit Judge Coleman, who filed a concurring opinion, disagreed rather vigorously that any such duty was imposed on the Courts. He stated:

"Under our Constitutionally ordained form of Government, whether an Act works or fails is the concern of the Executive or Legislature, or both -- not the courts."

We do not regard it as our function to enlarge on the plain language of a statute so as to impose on citizens obligations never intended by Congress, in order to make it work.

Great reliance is placed upon Hutchings v. United Industries, Inc., ... F. 2d ..... (5th Cir. 1970), which was decided after our decision in the present case was announced. In our opinion Hutchings does not comport with Boys Markets, Inc. v. Retail Clerks Union, Local 770, ... U.S..... (1970), 38 U.S. L. Week 4462.

In Boys Markets, Mr. Justice Brennan emphasized the importance of arbitration in the settlement of labor disputes. He said:

"However, we have frequently noted, in such cases as Lincoln Mills, the Steelworkers Trilogy, and Lucas Flour, the importance which Congress has attached generally to the voluntary settlement of labor disputes without resort to self-help and more particularly to arbitration as means to this end. Indeed, it has been stated that Lincoln Mills, in its exposition of § 301 (a),

'went a long way towards making arbitration the central institution in the administration of collective bargaining contracts.'

"The Sinclair decision, however, seriously undermined the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes without resort to strikes, lockouts, and similar devices. Clearly employers will be wary of assuming obligations to arbitrate specifically enforceable against them when no similarly effcacious remedy is available to enforce the concomitant undertaking of the union to refrain from striking." [footnote omitted].

Similarly, employers would be wary of arbitration clauses in collective bargaining agreements if, as in the present case, the arbitration is binding on them only and not on their employees.

Our case is even stronger than Boys Markets because the grievance here was submitted to arbitration and the arbitrator made an award which was final, binding and conclusive on the parties. It is as binding as a judgment. 5 Am Jur. 2d, ARBITRATION AND AWARD, § 147. It remains in full force and effect.

The amicus brief of NAACP Legal Defense Fund candidly recognizes that "[i]t may be true that the result of such an accommodation will be that the employer but not the employee will be bound by the decision of the arbitrator." (Brief, p. 14).

We know of no good reason why an award of an arbitrator should not be binding on both parties, the same as a judgment of a court.

It is difficult for us to believe that any employer would ever agree to arbitration of a grievance if he knew that the employee would not be bound by the result.

The importance of arbitration in the resolution of all labor disputes is the theme of the United Steel Workers Trilogy, 363 U.S. 564-602 (1960). The purpose of arbitration is thwarted if the awards are held by the courts to be binding on employers only and not on employees..

The petition for rehearing is denied.

McCree, Circuit Judge (dissenting). I would grant the petition for rehearing and affirm the judgment of the District Court for the reasons stated in the dissenting opinion of Judge Combs. Furthermore, I observe that in addition to the Seventh Circuit, Bowe v. Colgate-Palmolive Co., 416 F. 2d 711 (1969), the Fifth Circuit has held that appellee's invocation of the grievance-arbitration procedure did not bar him from proceeding in the District Court under Title VII of the Civil Rights Act. Hutchings v. United States Industries, Inc., No. 28750 (5th Cir. June 19, 1970).